(5)

No. 95-1521

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF STATE,
BUREAU OF CONSULAR AFFAIRS, ET AL.,
PETITIONERS

v.

LEGAL ASSISTANCE FOR VIETNAMESE
ASYLUM SEEKERS, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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Petition for Writ of Certiorari Filed: March 21, 1996
Certiorari Granted: June 17, 1996

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NOTICE

The following opinions have been omitted in printing this appendix because they appear on the following pages in the printed appendix to the petition for a writ of certiorari:

U.S. DISTRICT COURT
USDC DISTRICT OF COLUMBIA (WASHINGTON)

CIVIL DOCKET FOR CASE
No. 94-CV-361

LAVAS, ET AL.

v.

DOS, ET AL.

ASSIGNED TO: JUDGE STANLEY S. HARRIS
Demand: $0,000
Lead Docket: None
Dct No. in other court: None

Nature of Suit: 890

Jurisdiction: *US Defendant*

Filed: 02/25/94

Type D Appeal

RELEVANT DOCKET ENTRIES

2/25/94	1	COMPLAINT filed by plaintiff(s) LAVAS, plaintiff(s) THUA VAN LE, plaintiff(s) EM VAN VO, plaintiff(s) THU HOA THI DANG, plaintiff(s) TRUC HOA THI VO; Exhibits (21) (tth) [Entry date 03/01/94]

2/25/94	2	APPLICATION by plaintiff(s) LAVAS, plaintiff(s) THUA VAN LE, plaintiff(s) EM VAN VO, plaintiff(s) THU HOA THI DANG, plaintiff(s) TRUC HOA THI VO for temporary restraining order; Exhibits (21) (tth) [Entry date 03/01/94]
2/25/94	3	MOTION filed by plaintiff(s) LAVAS, plaintiff(s) THUA VAN LE, plaintiff(s) EM VAN VO, plaintiff(s) THU HOA THI DANG, plaintiff(s) TRUC HOA THI VO for preliminary injunction (tth) [Entry date 03/01/94]
2/25/94	4	MOTION filed by plaintiff(s) LAVAS, plaintiff(s) THUA VAN LE, plaintiff(s) EM VAN VO, plaintiff(s) THU HOA THI DANG, plaintiff(s) TRUC HOA THI VO to certify class action (tth)l [Entry date 03/01/94]
3/2/94	6	ORDER by Judge Stanley S. Harris: denying motion for temporary restraining order [2-1] by TRUC HOA THI VO, THU HOA THI DANG, EM VAN VO, THUA VAN LE, LAVAS; that defendants' opposition to plaintiffs' motion for a preliminary injunction and defendants' dispositive motion shall be filed on 3/15/94, with plaintiffs' reply be filed on 3/29/94 and defendants' reply be filed on 4/5/94; that a hearing on the merits and plaintiff's motion for a preliminary injunction is set for 4/7/94 at 5:00pm. (N) (emh)

3/3/94	9	NOTICE OF INTERLOCUTORY APPEAL by plaintiffs LAVAS, THUA VAN LE, EM VAN VO, THU HOA THI DANG, and TRUC HOA THI VO from order dated 3/2/94 [6-l], denying plaintiffs' motion for a temporary restraining order, entered on: 3/2/94. $5.00 filing fee and $100.00 docketing fee paid by counsel on 3/4/94. Copies mailed to William R. Stein, Esq. and Robert B. Jobe, Esq., counsel for plaintiffs and A.U.S.A. Bernadette Sargeant, counsel for defendants. Copy submitted to Judge Harris. (mlp) [Entry date 03/04/94]
3/7/94	11	CERTIFIED COPY of Order filed in USCA dated 3/6/94, referencing appeal [9-1] , granting request for preliminary injunctive relief; remanding case for further proceedings. USCA # 94-5046 (mbd) [Entry date 03/18/94]
3/21/94	13	MOTION filed by defendant for protective order (mlp) [Entry date 03/24/94]
3/22/94	15	MOTION filed by plaintiffs to compel production of specified documents; exhibit (1) (mlp) [Entry date 03/24/94]
3/24/94	19	ORDER by Judge Stanley S. Harris: denying motion to compel production of specified documents [15-1] by TRUC HOA THI VO, THU HOA THI DANG, EM VAN VO, THUA VAN LE, LAVAS, granting motion for protective order [13-1] by defendants (N) (emh) [Entry date 03/29/94]

3/30/94	20	MOTION filed by plaintiffs LAVAS, THUA VAN LE, EM VAN VO, THU HOA THI DANG, TRUC HOA THI VO for summary judgment; affidavit of Daniel Wolf, evidentiary appendix (bound document) (mlp) [Entry date 03/31/94] [Edit date 03/31/94]
3/30/94	21	RESPONSE by plaintiffs LAVAS, THUA VAN LE, EM VAN VO, THU HOA THI DANG, and TRUC HOA THI VO in opposition to motion to dismiss as to defendants [12-1] by defendants, motion for summary judgment [12-2] by defendants; affidavit of Daniel Wolf, evidentiary appendix (bound document) (mlp) [Entry date 03/31/94] [Edit date 03/31/94]
4/28/94	25	MEMORANDUM AND ORDER by Judge Stanley S. Harris: denying motion for summary judgment [20-1] by TRUC HOA THI VO, THU HOA THI DANG, EM VAN VO, THUA VAN LE, LAVAS, granting motion for summary judgment [12-2] by defendants, denying as moot motion to certify class action [4-1] by TRUC HOA THI VO, THU HOA THI DANG, EM VAN VO, THUA VAN LE, LAVAS, denying as moot motion for preliminary injunction [3-1] by TRUC HOA THI VO, THU HOA THI DANG, EM VAN VO, THUA VAN LE, LAVAS (emh) [Entry date 04/29/94]

5/4/94	27	NOTICE OF APPEAL by plaintiffs LAVAS, THUA VAN LE, EM VAN VO, THU HOA THI DANG, and TRUC HOA THI VO from Memorandum and Order [25-1] dated 4/28/94 and entered on: 4/29/94. $5.00 filing fee and $100.00 docketing fee paid. Copies mailed to counsel for plaintiffs and defendants. (mlp) [Entry date 05/05/94]
5/11/95	28	COPY of Order filed in USCA dated 5/9/95, referencing appear [27-1] remanding case to USDC for a determination of mootness; holding petition for rehearing in abeyance until USDC has determined the issue of mootness. USCA # 94-5104 (mbd)
6/6/95	30	MOTION (renewed) filed by plaintiff LAVAS, plaintiff THUA VAN LE, plaintiff EM VAN VO, plaintiff THU HOA THI DANG, plaintiff TRUC HOA THI VO to certify class action (mlp) [Entry date 06/07/95]
6/6/95	31	MOTION filed by plaintiff LAVAS, plaintiff THUA VAN LE, plaintiff EM VAN VO, plaintiff THU HOA THI DANG, plaintiff TRUC HOA THI VO to join as additional plaintiffs in this action Minh Nguyen, Tran Thi Thanh Xuan, Mandy Yung and Luu Han Vy and deeming the complaint amended to include the addition of these new plaintiffs (mlp) [Entry date 06/07/95]

6/6/95	32	MOTION filed by plaintiff LAVAS, plaintiff THUA VAN LE, plaintiff EM VAN VO, plaintiff THU HOA THI DANG, plaintiff TRUC HOA THI VO for summary judgment on the issue of mootness (mlp) [Entry date 06/07/95]
6/28/95	38	MOTION filed by defendants to dismiss complaint [1-1]; attachment (mlp) [Entry date 06/29/95]
9/11/95	43	MEMORANDUM OPINION by Judge Stanley S. Harris (N) (mlp)

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS; THUA VAN LE; EM VAN VO; THU HOA THI DANG; TRUC HOA THI VO, *Plaintiffs-Appellants*

v.

DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS; WARREN CHRISTOPHER, SECRETARY OF STATE IN HIS OFFICIAL CAPACITY; MARY A. RYAN, ASSISTANT SECRETARY OF STATE FOR CONSULAR AFFAIRS, IN HER OFFICIAL CAPACITY; DIANE DILLARD, DEPUTY ASSISTANT SECRETARY OF STATE FOR CONSULAR AFFAIRS, IN HER OFFICIAL CAPACITY; RICHARD MUELLER, IN HIS OFFICIAL CAPACITY, CONSULATE GENERAL OF UNITED STATES OF AMERICA; WAYNE LEININGER, CHIEF OF CONSULAR SECTION, IN HIS OFFICIAL CAPACITY, CONSULATE GENERAL OF UNITED STATES OF AMERICA; MATTHEW VICTOR, REFUGEE OFFICER, IN HIS OFFICIAL CAPACITY, CONSULATE GENERAL OF UNITED STATES OF AMERICA, *Defendants- Appellees*

5/10/94	CIVIL-US CASE docketed. Notice of Appeal filed by Appellant Leg Asst Vietnamese, Appellant Thua Van Le, Appellant Em Van Vo, Appellant Thu Hoa Thi Dang, Appellant Truc Hoa Thi Vo. [52855-1] (lrn)
5/10/94	MOTION filed (5 copies) by Appellant Leg Asst Vietnamese, Appellant Thua Van Le, Appellant Em Van Vo, Appellant Thu Hoa Thi Dang, Appellant Truc Hoa Thi Vo (certificate of service dated 5/10/94) to expedite case [52970-1] Response due on 5/17/94; (lrn)
6/22/94	PER CURIAM ORDER filed granting motion expedite case filed by Leg Asst Vietnamese, Thua Van Le, Em Van Vo, Thu

Hoa Thi Dang, Truc Hoa Thi Vo [52970-1] Establishing the initial briefing schedule [58795-1]: (Note: This is a Reg case) Appellants' brief due on 7/13/94; Appellants' appendix due on 7/13/94; Appellees' brief due on 8/12/94; Appellants' reply brief due on 8/26/94; An order establishing a date for oral argument shall issue separately. Before Judges Wald, Randolph*, Rogers. [*Judge Randolph would deny the motion to expedite] (lvs)

11/2/94 NOTICE filed by Appellees DOS, et al., informing the court that the Department of State has determined that, effective December 1, 1994, United States Consulates in Hong Kong and other Southeast Asian countries will discontinue immigrant visa processing for Vietnamese asylum seekers who have been determined not to qualify as refugees. [82313-1]. Certificate of service date 11/2/94. (lvs)

2/3/95 OPINION (10 pgs) for the Court filed by Judge Sentelle, DISSENTING OPINION (5 pgs) filed by Judge Randolph. (edb)

3/20/95 PETITION for rehearing [111470-1] and SUGGESTION, for rehearing in banc [111470-2] (19 copies) filed by Appellees DOS, et al. (c/s dated 3/20/95) (jth)

3/30/95 CLERK'S ORDER filed Directing appellant to respond to appellee's petition for rehearing [111470-1]. Response due on 4/14/95. The response shall be limited to the issue of mootness. (jth)

5/10/95 PER CURIAM ORDER filed granting the motion for leave to file filed by Appellees DOS, et al. [119300-1]. The parties disagree as to whether this case is moot, and because resolution of the dispute may require the evaluation of evidence presented by the parties. Directing the Clerk to file the lodged reply [119291-1]. FURTHER ORDERED that the record of this case be remanded to the District Court for a determination of mootness [122567-1]. FURTHER ORDERED that the petition for rehearing be held in abeyance until the District Court has determined the issue of mootness. [111470-1]. Before Judges Edwards, Sentelle, Randolph. (lvs)

9/12/95 SUPPLEMENTAL TRANSMITTAL FROM USDC (District Court decision on remand dated 09/11/95) [148554-1]. (jth)

10/17/95 SUPPLEMENTAL MEMORANDUM on Issues of Mootness in response to Petition for Rehearing and Suggestion for Rehearing In Banc filed by appellants. [156868-1] Copies: 20. Certificate of service date 10/17/95. (lej)

11/6/95 SUPPLEMENTAL BRIEF on Issue of Mootness in response to the petition for rehearing, filed by Appellee's DOS, et al. [160798-1] Copies: 20. Certificate of service date 11/6/95. (jth)

11/21/95 SUPPLEMENTAL REPLY BRIEF filed by Appellant Leg Asst Vietnamese, Appellant Thua Van Le, Appellant Em Van Vo, Appellant Thu Hoa Thi Dang,

Appellant Truc Hoa Thi Vo [164049-1]. Copies: 15. Certificate of service date 11/16/95. (jas)

2/2/96 OPINION (7 pgs) for the Court filed by Judge Sentelle, CONCURRING IN PART AND DISSENTING IN PART OPINION (2 pgs) filed by Judge Randolph. (edb)

2/2/96 PER CURIAM ORDER filed denying appellees' petition rehearing [111470-1] as set forth in the opinion of the Court filed this date. Before Judges Edwards, Sentelle, Randolph. (edb)

2/7/96 MOTION filed (5 copies) by Federal Appellee's DOS, et al. (certificate of service dated 2/7/96) to stay issuance of the mandate pending disposition of the Suggestion for Rehearing In Banc. Response due on 2/14/96. (jth)

2/12/96 PER CURIAM ORDER, In Banc, filed denying the suggestion for rehearing in banc [111470-2] filed by DOS, Warren Christopher, Mary A. Ryan, Diane Dillard, Richard Mueller, Wayne Leininger, Matthew Victor. Before Judges Edwards, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel. Circuit Judges Williams, Ginsburg, Henderson and Randolph would grant the suggestion. (lvs)

2/15/96 MOTION filed (5 copies) by Appellees DOS, et al. (certificate of service dated 2/15/96) to stay issuance of the mandate. (lvs)

2/21/96 PER CURIAM ORDER filed of appellees Motion to Continue Stay of Mandate Pending Disposition of Suggestion for Rehearing In Banc, filed February 7, 1996, the response and reply, and of appellees Motion to Stay Mandate to Permit the Government Time Within Which to Seek a Writ of Certiorari From the Supreme Court, filed February 15, 1996. FURTHER ORDERED that the motion of February 15, 1996 is granted [181265-1]. The Clerk is directed to withhold issuance of the mandate until 3/21/96. FURTHER ORDERED dismissing as moot the motion to stay mandate filed on February 7, 1996 [179292-1]. Before Judges Edwards, Sentelle, Randolph. (lvs)

3/4/96 PER CURIAM ORDER filed that the court treats appellants' opposition to appellee's motion for stay of mandate as a motion for reconsideration of the court's order of February 21, 1996, and that the court denies the motion [184698-1]. Before Judges Edwards, Sentelle, and Randolph. (jth)

3/13/96 MOTION filed (5 copies) by Appellees DOS, et al. (certificate of service dated 3/13/96) (STYLED AS EMERGENCY MOTION TO VACATE JUDGMENT OR, IN THE ALTERNATIVE, TO STAY THE MANDATE, PENDING DISPOSITION OF THE IN BANC PROCEEDING IN LISA LE) [187347-1] [187347-2]. Response due on 3/25/96. (lvs)

3/14/96 PER CURIAM ORDER filed of the emergency motion to vacate judgment or, in the alternative, to stay the mandate, pending disposition of the in banc proceeding in Lisa Le, it is ORDERED that the motion be denied. Before Judges Edwards, Sentelle, Randolph. (Judge Randolph would have ordered a response to the motion) (lvs)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ Action No. ——

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), 2800 JUNIPER ST. #3, FAIRFAX, VA. 22031; THUA VAN LE, 920 WEST LAKESIDE, CHICAGO, ILL. 60640; EM VAN VO, 6408 BEATLINE DR., LONG BEACH, MS. 39560; THU HOA THI DANG, HIGH ISLAND DETENTION CENTER, HONG KONG; TRUC HOA THI VO, HIGH ISLAND DETENTION CENTER, HONG KONG, *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, 2201 C. ST., N.W., WASHINGTON, D.C. 20520; WARREN CHRISTOPHER, SECRETARY OF STATE, IN HIS OFFICIAL CAPACITY, 2201 C. ST., N.W., WASHINGTON, D.C. 20520; MARY A. RYAN, ASSISTANT SECRETARY OF STATE FOR CONSULAR AFFAIRS, IN HER OFFICIAL CAPACITY, 2201 C. ST., N.W., WASHINGTON, D.C., 20520; DIANE DILLARD, DEPUTY ASSISTANT SECRETARY OF STATE FOR CONSULAR AFFAIRS, IN HER OFFICIAL CAPACITY, 2201 C. ST., N.W., WASHINGTON, D.C., 20520; RICHARD MUELLER, CONSUL, IN HIS OFFICIAL CAPACITY, CONSULATE GENERAL OF UNITED STATES OF AMERICA, 26 GARDEN RD., HONG KONG; WAYNE LEININGER, CHIEF OF CONSULAR SECTION, IN HIS OFFICIAL CAPACITY, CONSULATE GENERAL OF UNITED STATES OF AMERICA, 26 GARDEN RD., HONG KONG; MATTHEW VICTOR, REFUGEE OFFICER, IN HIS OFFICIAL CAPACITY, CONSULATE GENERAL OF UNITED STATES OF AMERICA, 26 GARDEN RD., HONG KONG, *Defendants*.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs Legal Assistance for Vietnamese Asylum Seekers; Thua Van Le and Em Van Vo, on behalf of themselves and all others similarly situated (hereinafter "Resident Plaintiffs"); Thu Hoa Thi Dang and Truc Hoa Thi Vo, on behalf of themselves and all others similarly situated (hereinafter "Detained Plaintiffs"), by their undersigned attorneys, as and for their complaint, allege as follows:

PRELIMINARY STATEMENT

1. This is a complaint for a writ of mandamus and for declaratory and injunctive relief arising out of Defendants' illegal refusal to process Detained Plaintiffs' applications for immigrant visas ("IVs") at the United States Consulate General ("U.S. Consulate") in Hong Kong. Defendants' refusal to process these IV applications at the U.S. Consulate in Hong Kong constitutes a dramatic reversal of their past practice and a violation of the Immigration and Nationality Act ("INA"), the binding federal regulations which govern the processing of IV applications, the Administrative Procedure Act ("APA"), and the United States Constitution.

2. Detained Plaintiffs, Thu Hoa Thi Dang ("Mrs. Dang") and Truc Hoa Thi Vo ("Mrs. Vo"), are citizens of the Socialist Republic of Vietnam ("Vietnam") who fled from Vietnam to Hong Kong by boat in May and July of 1991, respectively. Upon arriving in Hong Kong, they were incarcerated in a detention center for Vietnamese boat people, where they have resided since that time.

3. Resident Plaintiffs, Thua Van Le ("Mr. Le") and

Em Van Vo ("Mr. Vo"), are relatives of Detained Plaintiffs and citizens of the United States. They have petitioned the Immigration and Naturalization Service ("INS") under U.S. immigration laws for permission to bring Detained Plaintiffs from Hong Kong to the United States. The INS has approved their petitions.

4. As the beneficiaries of approved IV petitions, Detained Plaintiffs are eligible for IVs, which would entitle them to live and work permanently in this country. In order to obtain their IVs, Detained Plaintiffs must be interviewed at a United States consulate. Defendants are required by regulation to conduct Detained Plaintiffs' personal interviews and the final processing of their IV applications in their country of residence, Hong Kong. 22 C.F.R. § 42.61. In violation of the law, however, Defendants refuse to process Detained Plaintiffs' applications unless and until they return to Vietnam, where Detained Plaintiffs fear that their lives, freedom and right to emigrate would be threatened.

5. This civil action seeks to compel Defendants and the individuals acting under them from implementing their decision to refuse processing Detained Plaintiffs' IV applications at the U.S. Consulate in Hong Kong and to compel them to process such applications, as required by the INA, APA, and controlling federal regulations. *See* 22 C.F.R. § 42.61.

JURISDICTION AND VENUE

6. Jurisdiction is conferred on this Court by 28 U.S.C. § 1331, as a civil action arising under the Constitution, laws, or treaties of the United States; 28 U.S.C. § 1361, as a civil action to compel an officer or employee of the United States to perform a duty owed to plaintiffs; and 8 U.S.C. § 1329, as a civil action arising under the

Immigration and Nationality Act. These actions also are authorized by 5 U.S.C. § 702, as a challenge to agency action under the Administrative Procedure Act; and 28 U.S.C. § 2201 and 2202, as a civil action seeking, in addition to other remedies, a declaratory judgment.

7. Venue is properly in this district pursuant to 28 U.S.C. § 1391(b) and (e)(1) and (2), because at least one defendant in the action resides in this district, and a substantial part of the events or omissions giving rise to the claim occurred in this district. No real property is involved in this action.

PLAINTIFFS

Factual Allegations For Organizational Plaintiff

8. Plaintiff Legal Assistance for Vietnamese Asylum Seekers ("LAVAS") is a not-for-profit corporation, organized and existing under the laws of the State of Virginia, having its principal place of business at 2800 Juniper Street, #3, Fairfax, Virginia, 22031. The principal purpose of LAVAS is to provide legal assistance for Vietnamese nationals detained in Hong Kong and other parts of Southeast Asia, including, in particular, assistance in obtaining refugee status. Since LAVAS was created in December 1991, it has sent eight lawyers and twelve legal assistants to work in Vietnamese refugee camps in Southeast Asia and has assisted over 700 Vietnamese refugees.

9. At all times since its inception, LAVAS has had more demand for its services than its staff and volunteers have been able to meet. Its resources are severely restricted by the amount of funding received from charitable sources. Every added expenditure of time and effort on one case creates a resulting loss for another

potential case. In refusing to process Detained Plaintiffs' IV applications, the U.S. Consulate in Hong Kong is interfering with LAVAS' efforts to provide assistance to its clients and is causing LAVAS to waste its scarce resources fighting to establish that Detained Plaintiffs qualify for refugee status.

Factual Allegations For Individual Plaintiffs

10. Detained Plaintiffs, Mrs. Dang and Mrs. Vo, are natives and citizens of Vietnam. They fled from Vietnam to Hong Kong in May and July of 1991, respectively. Upon arriving in Hong Kong, they were incarcerated in detention centers for Vietnamese boat people where they have resided since that time. They are the beneficiaries of IV petitions that have been approved by the INS. These named plaintiffs also represent other similarly situated Vietnamese nationals who (a) reside or will reside in detention centers in Hong Kong, and (b) are or will become the beneficiaries of IV petitions that have been approved by the INS.

11. Resident Plaintiffs, Thua Van Le ("Mr. Le") and Em Van Vo ("Mr. Vo"), are citizens of the United States. Mr. Le is the husband of Mrs. Dang. Mr. Vo is the father of Mrs. Vo. Each has petitioned the INS for permission to bring their family members from the Vietnamese detention centers in Hong Kong to the United States, and each has obtained INS approval of their petitions. Resident Plaintiffs also represent other similarly situated persons who (1) are or will become citizens or lawful permanent residents of the United States, (2) have family members who are citizens of Vietnam that reside or will reside in Hong Kong and are being or will be detained by the Hong Kong immigration authorities, (3) have petitioned or will petition the INS to bring their family members to the

United States, and (4) have obtained or will obtain approval by the INS of their petitions.

DEFENDANTS

12. Defendant, U.S. Department of State, Bureau of Consular Affairs is the federal agency within the Department of State that is responsible for the administration and enforcement of the INA and all other immigration laws relating to the processing of IV applications by United States consular officers.

13. Defendant, Warren Christopher, is the Secretary of State of the United States. As the highest ranking official in the United States Department of State, he is charged by law with the administration of the provisions of the INA and all other immigration laws relating to (a) the powers, duties, and functions of diplomatic and consular officers of the United States, except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas, and (b) the powers, duties, and functions of the Bureau of Consular Affairs. Defendant Christopher is sued herein in his official capacity.

14. Defendant, Mary A. Ryan, is the Assistant Secretary of State for Consular Affairs and as such is responsible for the administration of the Bureau of Consular Affairs, including its Visa Office, and of the work of United States Consuls in the administration of the immigration laws. Defendant Ryan is sued herein in her official capacity.

15. Defendant, Diane Dillard, is the Deputy Assistant Secretary of State for Visa Services and as such is responsible for ensuring that consular officers process IV applications in accordance with the governing

statutes and regulations. Defendant Dillard is sued herein in her official capacity.

16. Defendant, Richard Mueller, is the Consul of the United States of America in Hong Kong and as such is responsible for processing IV applications that are filed by individuals residing in Hong Kong. Defendant Mueller is sued herein in his official capacity.

17. Defendant, Wayne Leininger, is the Chief of the Consular Section at the U.S. Consulate in Hong Kong and as such is responsible for processing IV applications that are filed by individuals residing in Hong Kong. Defendant Leininger is sued herein in his official capacity.

18. Defendant, Matthew Victor, is a refugee officer at the U.S Consulate in Hong Kong and as such is responsible for implementing U.S. policy relating to Vietnamese nationals detained in Hong Kong and for communicating such policies to Detained Plaintiffs. Defendant Victor is sued herein in his official capacity.

STATEMENT OF FACTS

19. Since 1979, the United States has allocated thousands of its annual refugee admissions, which are limited in number by a presidential order, to Vietnamese boat people. In addition to the refugee program, however, U.S. law provides several other channels through which qualified Vietnamese nationals may immigrate to the United States. *See* 8 U.S.C. §§ 1151-1156. The most important of these channels are the family-based visa categories, which entitle certain immediate relatives of U.S. citizens and lawful permanent residents to obtain IVs, which would allow them to live and work permanently in this country. *See* 8 U.S.C. § 1153(a).

20. In order to obtain an IV, eligible Vietnamese

refugees and their sponsors must complete several steps. First, the sponsoring U.S. citizen or lawful permanent resident—known as the "petitioner"—must file a petition (Form I-130) with the INS, which may either approve or deny the petition. 8 C.F.R. § 204.1(a). Second, if the INS approves the petition, the Vietnamese refugee—the "beneficiary"—must complete an application for an immigrant visa (Form OF-230). 22 C.F.R. § 42.63(a). Third, the beneficiary must appear at a U.S. consulate for final processing of the IV application, including an interview before a consular officer, who will determine whether to grant the visa. 22 C.F.R. § 42.62(a).

21. Under its binding regulations, the U.S. Department of State is required to conduct an IV applicant's consular interview "in the consular district in which the alien resides." 22 C.F.R. § 42.61. The term "residence" is defined as the place of "principal, actual dwelling in fact, without regard to intent." 8 U.S.C. § 1101(a)(33). The fact that a beneficiary does not have a legal status in her country of residence is not relevant. U.S. Department of State, *Foreign Affairs Manual* § 42.61, N.1.2. Under the INA and the United States Constitution, consular officers are prohibited from discriminating against Detained Plaintiffs on the basis of nationality in issuing immigrant visas. 8 U.S.C. § 1152(a).

22. Since June 15, 1988, Vietnamese nationals arriving in Hong Kong without proper immigration documents have been regarded as illegal aliens by the Hong Kong Government and placed in detention centers pending determinations of their status as refugees by the Hong Kong immigration authorities.

23. Detained Plaintiffs, Mrs. Dang and Mrs. Vo, arrived in Hong Kong in May and July of 1991, respectively. Upon their arrival in Hong Kong, they were

placed in detention camps, where they have resided since that time.

24. Resident Plaintiffs, Mr. Le and Mr. Vo, have filed immigrant visa petitions (Form I-130) with the INS on behalf of the Detained Plaintiffs, Mrs. Dang and Mrs. Vo, respectively. The INS has approved each of these petitions. The Detained Plaintiffs have completed all the necessary forms and are, therefore, immediately eligible for an IV interview before a United States consular officer.

25. Because Detained Plaintiffs presently reside in Hong Kong, they are entitled to have their immigrant visa interviews before a consular officer at the U.S. Consulate in Hong Kong.

26. Until approximately September 1993, consular interviews and the final processing of IV applications for Vietnamese nationals who were detained by Hong Kong immigration authorities were conducted in Hong Kong. In approximately September 1993, however, the U.S. Department of State abruptly ended this practice. Since that time, the U.S. Consulate in Hong Kong has refused to process IV applications for Vietnamese residents of Hong Kong who are not legally in the Colony and who have not been recognized as refugees.

27. In violation of the law, Defendants refuse to conduct the Detained Plaintiffs' consular interviews in Hong Kong. Rather, Defendants insist that Detained Plaintiffs return to Vietnam for their consular interviews and the final processing of their immigrant visa applications.

28. Defendants have chosen to disregard the controlling federal regulations, because Detained Plaintiffs are Vietnamese nationals who have not been recognized as refugees by the Hong Kong immigration authorities. Were Detained Plaintiffs nationals of any country but

Vietnam, their applications for an IV would be processed at the U.S. Consulate in Hong Kong, without regard to their status with Hong Kong immigration authorities. Accordingly, Defendants' conduct constitutes discrimination on the basis of nationality in violation of 8 U.S.C. § 1152(a)(1) and the Fifth Amendment to the U.S. Constitution.

29. Plaintiffs have exhausted any administrative remedies that may exist. No other remedy exists for Plaintiffs to resolve Defendants' refusal to comply with 22 C.F.R. § 42.61, the INS, APA, and the U.S. Constitution.

30. Defendants are engaging in a continuing practice of illegally refusing to process the IV applications of Detained Plaintiffs at the U.S. Consulate in Hong Kong. As a result, Plaintiffs have suffered, and will continue to suffer, irreparable injury for which they have no adequate remedy at law. If the relief prayed for is not granted, Detained Plaintiffs will suffer continued detention and separation from their family members in the United States. Similarly, Resident Plaintiffs will suffer continued separation from their family members who are detained in Hong Kong and violation of their Fifth Amendment right to equal protection under the law. The detained plaintiffs are at risk of being forcibly repatriated to Vietnam or of voluntarily repatriating, believe that they have no other choice since they have been informed the U.S. Consulate will not process their IVs in Hong Kong. Those who return or are returned will suffer extreme individual hardship and emotional distress.

31. Detained Plaintiffs are unwilling to return voluntarily to Vietnam, because they fear that their lives or freedom will be threatened, that they will have no means to support themselves, and that the Hanoi regime may deny them permission to exit Vietnam. If Detained Plaintiffs return to Vietnam, they will lose

their rights to procedures offered by the Hong Kong immigration authorities for determining whether they qualify for refugee status.

CLASS ACTION ALLEGATIONS

32. The named individual plaintiffs bring this action pursuant to Rule 23(a) and (b)(2) on behalf of themselves and all other persons similarly situated in the following presently ascertainable classes:

33. All Vietnamese nationals who (a) reside or will reside in detention centers in Hong Kong, and (b) are or will become the beneficiaries of immigrant visa petitions that have been approved by the INS. On information and belief, this group presently contains at least 90 and possibly more than 250 members.

34. All citizens and lawful permanent residents of the United States who (1) have family members who are citizens of Vietnam that reside or will reside in immigration detention centers in Hong Kong, (2) have petitioned or will petition the INS to bring their family members to the United States, and (3) have obtained or will obtain approval by the INS of their petitions. On information and belief, this group presently contains at least 90 and possibly more than 250 members.

35. The questions of law common to each of the plaintiff class members are: (1) Whether Defendants are required to process immigrant visa applications in the consular district in which the IV applicant resides; (2) whether the U.S. Constitution, the INA, and the controlling regulations allow Defendants to discriminate in the processing of visa applications on the basis of nationality; (3) whether the Defendants have violated the rulemaking provisions of the Administrative Procedure Act

by reversing their policy of processing IV applications of detained Vietnamese refugees at the U.S. Consulate in Hong Kong without providing any prior notice or opportunity to affected persons to comment on the change in policy.

36. Plaintiff classes warrant class action treatment because: they are sufficiently numerous; Defendants have acted or threatened to act on grounds generally applicable to each member of each class in that they have refused to process IV applications for Vietnamese nationals who are detained in Hong Kong at the U.S. Consulate in Hong Kong, thus making final mandamus, declaratory and injunctive relief with respect to each class as a whole appropriate; the Plaintiffs are adequate representatives of their classes because their interests are identical to those of the other class members, they have every incentive to pursue this action to a successful conclusion and they are represented by competent legal counsel; and the claims of the named plaintiffs are both common to and typical of the claims of members of each class.

FIRST CAUSE OF ACTION

(Mandamus)

37. Plaintiffs repeat, allege and incorporate paragraphs 1 through 36 above as if fully set forth herein.

38. Pursuant to 22 C.F.R. § 42.61 and 8 U.S.C. § 1152(a)(1), Defendants owe Plaintiffs the duty of processing Detained Plaintiffs' IV applications at the U.S. Consulate in Hong Kong and the duty not to discriminate against Plaintiffs on the basis of their nationality, or the nationality of their family members, in the processing of their IV applications. Defendants, however,

willfully refuse to comply with their duty. Plaintiffs are entitled, therefore, to relief in the nature of mandamus pursuant to 28 U.S.C. § 1361 to compel Defendants to perform their duty to process Detained Plaintiffs' visa applications in a non-discriminatory fashion at the U.S. Consulate in Hong Kong.

SECOND CAUSE OF ACTION

(Violation of the Administrative Procedure Act)

39. Plaintiffs repeat, allege and incorporate paragraphs 1 through 36 above as if fully set forth herein.

40. Plaintiffs are persons aggrieved by agency action under the Administrative Procedure Act. 5 U.S.C. §§ 701 *et. seq.* Defendants' failure to process Detained Plaintiffs' IV applications at the U.S. Consulate in Hong Kong has resulted in Plaintiffs being deprived of their rights to reasonably prompt processing of IV applications under 22 C.F.R. § 42.61 and 8 U.S.C. § 1152(a)(1). Plaintiffs, therefore, are entitled to injunctive relief to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

THIRD CAUSE OF ACTION

(Violation of the Administrative Procedure Act)

41. Plaintiffs repeat, allege and incorporate paragraphs 1 through 36 above as if fully set forth herein.

42. By failing to process Detained Plaintiffs' IV applications in Hong Kong and by implementing a policy that discriminates against nationals of Vietnam, Defendants are acting arbitrarily and capriciously and contrary to law in violation of 5 U.S.C. § 706.

FOURTH CAUSE OF ACTION

(Violation of the Administrative Procedure Act)

43. Plaintiffs repeat and reallege paragraphs 1 through 36 as though fully set forth herein.

44. The policies and practices of Defendants in requiring Detained Plaintiffs to return to Vietnam for the final processing of their IV applications constitute substantive rules that have a substantial impact on the individuals regulated, on their family members in this country, on their legal representatives, and on the general public.

45. Defendants' failure to publish these policy changes in the Federal Register and to allow for notice and comment violates the rulemaking procedures set out in the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.*, and renders them void.

FIFTH CAUSE OF ACTION

(Violation of the Immigration and Nationality Act)

46. Plaintiffs repeat, allege and incorporate paragraphs 1 through 36 above as if fully set forth herein.

47. By discriminating against plaintiffs on the basis of their nationality and national origin, Defendants are violating 8 U.S.C. § 1152(a)(1).

SIXTH CAUSE OF ACTION

(Equal Protection)

48. Plaintiffs repeat and reallege paragraphs 1 through 36 as though fully set forth herein.

49. By discriminating against Plaintiffs on the basis of their nationality and national origin, Defendants have

denied Plaintiffs the equal protection of the laws that is guaranteed them under the Fifth Amendment to the U.S. Constitution.

RELIEF REQUESTED

WHEREFORE, Plaintiffs and the members of the classes they represent pray that this Court:

(1) Accept jurisdiction over this action;

(2) Certify each class;

(3) Declare that the practices challenged herein violate the U.S. Constitution, Immigration and Nationality Act and 22 C.F.R. § 42.61;

(4) Issue an order in the nature of mandamus requiring Defendants and those acting under them to comply with 22 C.F.R. § 42.61 and perform their duty to conduct the final processing of the Detained Plaintiffs' visa applications, and all others similarly situated, at the U.S. Consulate in Hong Kong;

(5) Issue a preliminary and permanent injunction enjoining Defendants, their agents, employees and successors in office from implementing their decision to refuse processing of Detained Plaintiffs IV applications;

(6) Issue a preliminary and permanent injunction compelling Defendants, their agents, employees and successors in office to: (a) Immediately notify the Hong Kong Immigration Department, the Hong Kong Refugee Status Review Board and the Office of the United Nations High Commissioner for Refugees in Hong Kong of this Court's order enjoining Defendants from refusing to process the aforementioned visa applications; (b) Immediately notify all beneficiaries of current IV petitions that their applications will be

processed at the U.S. Consulate in Hong Kong; (c) Immediately request the Hong Kong Immigration Department to make available all cases of beneficiaries of current IV petitions to the U.S. Consulate for processing; and (4) Complete processing of IV applications of any beneficiary of a current IV petition in not more than 30 days after such case is made available to the U.S. Consulate for processing.

(7) Grant such other and further relief as this Court deems proper under the circumstances; and

(8) Grant attorney's fees and costs of court.

Respectfully submitted,

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Attorneys for Plaintiffs

Dated: February 24, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 94-361 SSH

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

ORDER

Before the Court are defendants' motion for a protective order and plaintiffs' motion to compel. Upon careful consideration of the entire record, it hereby is

ORDERED, that defendants' motion for a protective order is granted, and plaintiffs' motion to compel is denied.

SO ORDERED.

Stanley S. Harris
United States District Judge

Date: Mar. 24, 1994

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5104

September Term, 1993

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS; THUA VAN LE; EM VAN VO; THU HOA THI DANG; TRUC HOA THI VO, *Appellants*,

v.

DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS; WARREN CHRISTOPHER, SECRETARY OF STATE, ET AL.

Filed Jun 22, 1994

BEFORE: Wald, Randolph and Rogers, Circuit Judges

ORDER

Upon consideration of the motion for expedited consideration of appeal, the opposition thereto and the reply, it is

ORDERED that the motion be granted. *See D.C. Circuit Handbook of Practice and Internal Procedures* 70 (1994). The following briefing schedule shall apply:

Appellants' brief and appendix	July 13, 1994
Appellees' brief	August 12, 1994
Appellants' reply brief	August 26, 1994

An order establishing a date for oral argument shall issue separately.

Per Curiam

* Judge Randolph would deny the motion to expedite.

COMPREHENSIVE PLAN OF ACTION

I. DECLARATION

The Government of the States represented in the International Conference on Indo-Chinese Refugees, held at Geneva from 13 to 14 June 1989,

Having reviewed the problems of Indo-Chinese asylum-seekers in the South-East Asian region,

Noting that, since 1975, over 2 million persons have left their countries of origin in Indo-China and that the flow of asylum-seekers still continues,

Aware that the movement of asylum-seekers across frontiers in the South-East Asian region remains a subject of intense humanitarian concern to the international community,

Recalling United Nations General Assembly Resolution 3455 and the first Meeting on Refugees and Displaced Persons in South-East Asia convened at Geneva in July 1979 under the auspices of the United Nations to address the problem,

Recalling further the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, and related instruments,

Noting with satisfaction that, as a result of combined efforts on the part of Governments and International Organizations concerned, a durable solution has been found for over 1.6 million Indo-Chinese,

Preoccupied however by the burden imposed, particularly on the neighbouring countries and territories, as a result of the continuation of the outflow and the presence of large numbers of asylum-seekers still in camps,

Alarmed by indications that the current arrangements designed to find solutions for the asylum-seekers and resolve problems stemming from the outflow may no

longer be responsive to the size, tenacity and complexity of the problems in the region,

Recognizing that the resolution of the problem of asylum-seekers in the region could contribute positively to a climate of peace, harmony and good-neighbourliness,

Satisfied that the international community, and in particular the countries directly involved, have responded positively to the call for a new international conference made by the States members of the Association of South-East Asian Nations and endorsed by the Executive Committee of the Programme of the United Nations High Commissioner for Refugees at its thirty-ninth session and by the General Assembly at its forty-third session,

Noting the progress achieved towards a solution of this issue by the various bilateral and multilateral meetings held between the parties concerned prior to the International Conference on Indo-Chinese Refugees,

Noting that the issues arising from the presence of Khmer Rouge refugees and displaced persons are being discussed, among the parties directly involved, within a different framework and as such have not been included in the deliberations of the Conference,

Noting with satisfaction the positive results of the Preparatory Meeting for the Conference, held in Kuala Lumpur from 7 to 9 March 1989,

Realizing that the complex problem at hand necessitates the co-operation and understanding of all concerned and that a comprehensive set of mutually reenforcing humanitarian undertakings, which must be carried out in its totality rather than selectively, is the only realistic approach towards achieving a durable solution to the problem,

Acknowledging that such a solution must be developed in the context of national laws and regulations as well as of international standards,

Have solemnly resolved to adopt the Comprehensive Plan of Action.

II. COMPREHENSIVE PLAN OF ACTION

A. Clandestine departures

1. Extreme human suffering and hardship, often resulting in loss of lives, have accompanied organized clandestine departures. It is therefore imperative that humane measures be implemented to deter such departures, which should include the following:

(a) Continuation of official measures directed against those organizing clandestine departures, including clear guidelines on these measures from the central government to the provincial and local authorities.

(b) Mass media activities at both local and international level, focusing on:

(i) The dangers and hardships involved in clandestine departures;

(ii) The institution of a status-determination mechanism under which those determined not to be refugees shall have no opportunity for resettlement;

(iii) Absence of any advantage, real or perceived, particularly in relation to third-country resettlement, of clandestine and unsafe departures;

(iv) Encouragement of the use of regular departure and other migration programmes;

(v) Discouragement of activities leading to clandestine departures.

(c) In the spirit of mutua1 co-operation, the countries

concerned shall consult regularly to ensure the effective implemention and co-ordination of the above measures.

B. Regular departure programmes

2. In order to offer a preferable alternative to clandestine departures, emigration from Viet-Nam through regular departure procedures and migration programmes, such as the current Orderly Departure Programme, should be fully encouraged and promoted.

3. Emigration through regular departure procedures and migration programmes should be accelerated and expanded with a view to making such programmes the primary and eventually the sole modes of departure.

4. In order to achieve this goal, the following measures will be undertaken:

(a) There will be a continuous and widely publicized media campaign to increase awareness and regular departure procedures and migration programmes for departure from Viet-Nam.

(b) All persons eligible under regular third-country migration programmes, Amerasians and former re-eduation center detainees will have full access to regular departure procedures and migration programmes. The problem of former re-education center detainees will be further discussed separately by the parties concerned.

(c) Exit permits and other resettlement requirements will be facilitated for all persons eligible under regular departure procedures and migration programmes.

(d) Viet-Nam will fully co-operate with the United Nations High Commissioner for Refugees (UNHCR) and the Intergovernmental Committee for Migration (ICM) in expediting and improving processing, including

medical processing, for departures under regular departure procedures and migration programmes and will ensure that medical records of those departing comply with standards acceptable to receiving countries.

(e) Viet-Nam, UNHCR, ICM and resettlement countries will co-operate to ensure that air transportation and logistics are sufficient to move expeditiously all those accepted under regular departure procedures and migration programmes.

(f) If necessary, countries in South-East Asia through which people emigrating under regular departure procedures and migration programmes must transit will, with external financial support as appropriate, expand transit facilities and expedite exit and entry procedures in order to help facilitate increased departures under such programmes.

C. Reception of new arrivals

5. All those seeking asylum will be given the opportunity to do so through the implementation of the following measures:

(a) Temporary refuge will be given to all asylum-seekers, who will be treated identically regardless of their mode of arrival until the status-determination process is completed.

(b) UNHCR will be given full and early access to new arrivals and will retain access, following the determination of their status.

(c) New arrivals will be transferred, as soon as possible, to a temporary asylum centre where they would be provided assistance and full access to the refugee status-determination process.

D. Refugee status

The early establishment of a consistent region-wide refugee status-determination process is redesigned and will take place in accordance with national legislation and internationally accepted practice. It will make specific provision, *inter alia*, for the following:

(a) Within a prescribed period, the status of the asylum-seeker will be determined by a qualified and competent national authority or body, in accordance with established refugee criteria and procedures. UNHCR will participate in the process in an observer and advisory capacity. In the course of that period, UNHCR shall advise in writing each individual of the nature of the procedure, of the implications for rejected cases and of the right to appeal the first-level determination.

(b) The criteria will be those recognized in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, bearing in mind, to the extent appropriate, the 1948 Universal Declaration of Human Rights and other relevant international instruments concerning refugees, and will be applied in a humanitarian spirit taking into account the special situation of the asylum-seekers concerned and the need to respect the family unit. A uniform questionnaire will be the basis for interviews and shall reflect the elements of such criteria.

(c) The Handbook on Procedures and Criteria for Determining Refugee Status issued by the UNHCR, will serve as an authoritative and interpretative guide in developing and applying the criteria.

(d) The procedures to be followed will be in accordance with those endorsed by the Executive Committee of the Programme of the United Nations High Commissioner for Refugees in this area. Such procedures will include, *inter alia*:

(i) The provision of information to the asylum-seekers about the procedures, the criteria and the presentation of their cases;

(ii) Prompt advice of the decision in writing within a prescribed period;

(ii) A right of appeal against negative decisions and proper appeals procedures for this purpose, based upon the existing laws and procedures of the individual place of asylum, with asylum-seeker entitled to advice, if required, to be provided under UNHCR auspices.

UNHCR will institute, in co-operation with the Govemments concerned, a comprehensive regional-training programme for officials involved in the determination process with a view to ensuring the proper and consistent functioning of the procedures and application of the criteria, taking full advantage of the experience gained in Hong Kong.

E. Resettlement

8. Continued resettlement of Vietnamese refugees benefiting from temporary refuge in South-East Asia is a vital component of the Comprehensive Plan of Action.

1. Long-stayers Resettlement Programme

9. The Long-stayers Resettlement Programme includes all individuals who arrived in temporary asylum camps prior to the appropriate cut-off date and would contain the following elements:

(a) A call to the international community to respond to the need for resettlement, in particular through participation by an expanded number of countries, beyond those

few currently active in refugee resettlement. The expanded number of countries could include, among others, the following: Australia, Austria, Belgium, Canada, Denmark, Germany, Federal Republic of, Finland, France, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, United Kingdom and United States of America.

(b) A multi-year commitment to resettle all the Vietnamese who have arrived in temporary asylum camps prior to an agreed date, except those persons already found not to be refugees under established status-determination procedure and those who express the wish to return to Viet-Nam. Refugees will be advised that they do not have the option of refusing offers of resettlement, as this would exclude them from further resettlement consideration.

2. Resettlement Program for Newly-Determined Refugees

10. The Resettlement Program for Newly-Determined Refugees will accommodate all those arriving after the introduction of status determination procedures and who are determined to be refugees. Within a designated period after their transfer to the resettlement area, those determined to be refugees shall receive an orientation briefing from a UNHCR representative that explains the third-country resettlement programme, the length of time current arrivals may expect to spend in camp awaiting resettlement, and the necessity of adhering to the rules and regulations of the camp.

11. Whenever possible, a pledge shall be sought from the resettlement countries to place all those determined to be refugees, except those expressing the wish to return to Viet-Nam, within a prescribed period. It shall

be the responsibility of UNHCR, with the full support of all the resettlement countries and countries of asylum, to co-ordinate efforts to ensure that departures are effected within that time.

F. Repatriation—Plan of Repatriation

12. Persons determined not to be refugees should return to their country of origin in accordance with international practices reflecting the responsibilities of States toward their own citizens. In the first instance, every effort will be made to encourage the voluntary return of such persons.

13. In order to allow this process to develop momentum, the following measures will be implemented:

(a) Widely publicized assurances by the country of origin that returnees will be allowed to return in conditions of safety and dignity and will not be subject to persecution.

(b) The procedure for readmission will be such that the applicants would be readmitted within the shortest possible time.

(c) Returns will be administered in accordance with the above principles by UNHCR and ICM, and internationally funded re-integration assistance will be channelled through UNHCR, according to the terms of the Memorandum of Understanding signed with Viet-Nam on 13 December 1988.

14 If, after the passage of reasonable time, it becomes clear that voluntary repatriation is not making sufficent progress towards the desired objective, alternatives recognized as being acceptable under international practices would be examined. A regional holding centre under the

auspices of UNHCR may be considered as an interim measure for housing persons determined not to be refugees pending their eventual return to the country of origin.

15. Persons determined not to be refugees shall be provided humane care and assistance by UNHCR and international agencies pending their retum to the country of origin. Such assistance would include educational and orientation programmes designed to encourage return and reduce re-integration problems.

G. Laotian asylum-seekers

16. In dealing with Laotian asylum-seekers, future measures are to be worked out through intensified trilateral negotiations between UNHCR, the Lao People's Democratic Republic and Thailand, with the active support and co-operation of all parties concerned. These measures should be aimed at:

(a) Maintaining safe arrival and access to the Lao screening process;

(b) Accelerating and simplifying the process for both the return of the screened out and voluntary repatriation to the Lao People's Democratic Republic under safe, humane and UNHCR-monitored conditions.

17. Together with other durable solutions, third-country resettlement continues to play an important role with regard to the present camp population of the Laotians.

H. Implementation and review procedures

18. Implementation of the Comprehensive Plan of Action is a dynamic process that will require continued

co-ordination and possible adaptation to respond to changing situations. In order to ensure effective implementation of the Plan, the following mechanisms shall be established:

(a) UNHCR, with the financial support of the donor community, will be in charge of continuing liaison and co-ordination with concerned Governments and intergovernmental as well as non-governmental organizations to implement the Comprehensive Plan of Action.

(b) A Steering Committee based in South-East Asia will be established. It will consist of representatives of all Governments making specific commitments under the Comprehensive Plan of Action. The Steering Committee will meet periodically under the chairmanship of UNHCR to discuss implementation of the Comprehensive Plan of Action. The Steering Committee may establish sub-committes as necessary to deal with specific aspects of the implementation of the Plan, particularly with regard to status determination, return and resettlement.

(c) A regular review arrangement will be devised by UNHCR, preferably in coinjunction with the annual Executive Committee session, to assess progress in implementation of the Comprehensive Plan of Action and consider additional measures to improve the Plan's effectiveness in meeting its objectives.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. ——

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL ., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

AFFIDAVIT OF MICHAEL T. DARWYNE

I, Michael T. Darwyne, Barrister, of Gilt Chambers, 1103 Far East Finance Centre, 16 Harcourt Road, Hong Kong, make oath and say as follows:

1. I am a barrister practicing in Hong Kong at the above address. I was admitted to the English Bar in 1969 and to the Hong Kong Bar in 1986. From 1986 to 1990 I served as Crown Counsel in the Legal Department of the Hong Kong Government. Since 1990 I have been in private practice at the Hong Kong Bar. My practice is predominantly in the field of public law with particular reference to refugee status determination of Vietnamese asylum seekers. I have been counsel or co-counsel in the two leading High Court judicial reviews of decisions of the Immigration Department and Refugee Status Review Board. I have also given legal advice to many Vietnamese asylum seekers in relation to their claims for refugee status. I am familiar with the Hong Kong Immigration Ordinance, the Comprehensive Plan of Action and international instruments affecting refugees.

2. I have been asked whether a Vietnamese asylum seeker detained in a Hong Kong Detention Centre is legally entitled to attend for an interview with a United States Consular officer at the premises of the United States Consul General at 26 Garden Road, Hong Kong. This raises questions of law and practise concerning the treatment of Vietnamese asylum seekers in Hong Kong which I am qualified to answer.

3. Section 13D(2) of the Hong Kong Immigration Ordinance, Chapter 115 of the Laws of Hong Kong, (Exhibit No. 1) provides:

> "Every person detained under this section shall, be permitted all reasonable facilities to enable him to obtain any authorization required for entry to another state or territory or, whether or not he has obtained such authorization, to leave Hong Kong."

4. By virtue of this section, every Vietnamese detainee has the right to expect that he will be permitted all reasonable facilities to enable him to obtain a visa to a third country, or, if he has travel arrangements, to leave Hong Kong. The section is used to permit those detainees who have either not yet been recognised as refugees by the Hong Kong Government, or who have been denied refugee status by the Hong Kong Government, to exit the Detention Centre in order to complete marriage formalities with overseas nationals; to attend at embassies to complete visa processing and medical checks and then to proceed to a Departure Centre near the airport prior to departing to join their spouse overseas under family reunion programmes or under direct visas. An example of such a request is attached. (Exhibit No. 2)

5. In my opinion, if a detainee was to be a refused a request made to the appropriate Hong Kong Govern-

ment authorities by a foreign consulate or embassy for a Vietnamese detainee to be allowed to attend upon the premises of the foreign consulate or embassy for the purpose of an interview to enable him to obtain any authorization required for entry to that state, the detainee would be entitled to apply to the High Court for leave to seek judicial review of that refusal and to include as part of his prayer for relief a claim for an order of Mandamus pursuant to Order 53 of the Rules of the Supreme Court of Hong Kong, ordering the relevant officials to enable him to so attend. Since the language of section 13D(2) is mandatory and permits of no exceptions, such an application would almost certainly succeed.

6. The position would, in my view, be exactly the same if the request was made by the detainee himself, rather than by the foreign consulate or embassy, except that a burden would rest upon the detainee to establish that his request was a legitimate one in the sense that he actually had been given an appointment by the consulate or embassy for an interview to enable him to obtain any authorization required for entry to that state.

7. The administrative mechanism whereby a detainee is authorised to leave a Detention Centre is provided for by Rule 28 of the Immigration (Vietnamese Boat People) (Detention Centres) Rules, Cap. 115 (Exhibit No. 3) which says: -

> "(1) The Superintendent may, if he sees fit, permit a detainee to be absent from the detention centre for such purpose, during such period and on such terms as the Superintendent may specify."

8. To my personal knowledge this Rule has been used, for example, to allow detainees to leave the Centre to attend for a large variety of purposes, including to have music tuition, to buy daily necessities and have dinner,

to attend at a children's concert, and to spend a honeymoon weekend with a newly acquired spouse.

9. There are now produced and shown to me marked Exhibits numbered MTD-1, a copy of the documents referred to above as Exhibits numbered 1 through 3 respectively.

Sworn at

this 31st of January 1994

BEFORE ME

_____

Pat Bossy Ying Ho

NOTARY PUBLIC

AFFIDAVIT OF MICHAEL T. DARWYNE

EXHIBITS

This is the Exhibit marked "MTD-1" referred to in the Affidavit of MICHAEL T. DARWYNE sworn before me this 31st day of 1994.

Signed ——————————

Notary Public

Exhibit Marked	*Description*	*No. of Pages Including This Page*
MTD-1	Extract of Immigration Ordinance and Regulations. Six(6) Letter	

Ho & Chan
Solicitors & Noataries
12/Floor Fung House
19-20 Connaught Road
HONG KONG

EXHIBIT NO: 1

CHAPTER 115

IMMIGRATION ORDINANCE

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Section

PART III

CONTROL OF IMMIGRATION

PART IIIA

VIETNAMESE REFUGEES

Section

PART IV

SUPPLY OF PARTICULARS BY ALIENS AND BY PERSONS STAYING; IN HOTELS OR OTHER LODGING; PLACES

PART IVA

REQUIREMENT TO CARRY PROOF OF IDENTITY

PART IVB

13C. Designation refugee centres

(1) The Secretary for Security may by order desingate any place as a refugee centre for the residence or detention of Vietnamese refugees. (*Amended 42 of 1982 s. 6*)

(2) The Secretary for Security may make rules providing for the treatment, and control of conduct, of Vietnamese refugees in refugee centres and for the management and security of, and the maintenance of order, discipline, cleanliness and hygiene in, refugee centres, and different rules may be made in respect of different centres. (*Replaced 42 of 1982 s. 6*)

(3) Without prejudice to the generality of subsection (2), rules made under that subsection may provide for—

(*a*) contravention of any provision thereof to be punished by the imposition of a penalty not exceeding $500 and by separate confinement for a period not exceeding 28 days; (*Amended 42 of 1982 s. 6*)

(*b*) the confinement of persons punished by separate confinement;

(*c*) the imposition, by a specified public officer, of such punishment for such contravention;

(*d*) appeals against the imposition of punishment and the practice and procedure relating to such appeals;

(*e*) the payment and the disposal of monetary penalties in any manner whatsoever.

(4) Any refugee centre designated as a refugee centre for the detention of Vietnamese refugees shall be under the control and management of the Commissioner of Correctional Services and notwithstanding section 13A or 13D, any Vietnamese refugee detained therein may be removed by the Commissioner of Correctional Services from such refugee centre to any other refugee centre so designated. (*Added 42 of 1982 s. 6*)

(5) Without prejudice to the generality of subsection (2) rules made under that subsection in respect of any refugee centre designated as a refugee centre for the detention of Vietnamese refugees may provide for—

(*a*) the powers, duties, conduct and discipline of officers of the Correctional Services Department and other persons employed in refugee centres;

(*b*) the duties and powers of visiting justices;

(*c*) the conditions under which visitors may be allowed to visit refugee centres. (*Added 42 of 1982 s. 6*)

13D. Detention pending decision as to permission to remain in Hong Kong, or pending removal from Hong Kong

(1) As from 2 July 1982 any resident or former resident of Vietnam who—

(a) arrives in Hong Kong not holding a travel document which bears an unexpired visa issued by or on behalf of the Director; and

(b) has not been granted an exemption under section 61(2).

may, whether or not he has requested permission to remain in Hong Kong, be detained under the authority of the Director in such detention centre as an immigration officer may specify pending a decision to grant or refuse him permission to remain in Hong Kong or, after a decision to refuse him such permission, pending his removal from Hong Kong, and any child of such a person, whether or not he was born in Hong Kong and whether or not he has requested permission to remain in Hong Kong, may also be so detained, unless that child holds a travel document with such a visa or has been granted an exemption under section 61(2). (*Replaced 52 of 191 s. 2*)

(1A) The detention of a person under this section shall not be unlawful by reason of the period of the detention if that period is reasonable having regard to all the circumstances affecting that person's detention, including—

(*a*) in the case of a person being detained pending a decision under section 13A(1) to grant or refuse him permission to remain in Hong Kong as a refugee—

(i) the number of persons being detained pending decisions under section 13A(1) whether to grant or refuse them such permission; and

(ii) the manpower and financial resources allocated to carry out the work involved in making all such decisions;

(*b*) in the case of a person being detained pending his removal from Hong Kong—

(i) the extent to which it is possible to make arrangements to effect his removal; and

(ii) whether or not the person has declined arrangements made or proposed for his removal. (*Added 52 of 1991 s. 2*)

(1B) The detention of a person under this section pending a decision under section 13A(1) to grant or refuse him permission to remain in Hong Kong as a refugee shall not be unlawful by reason that other persons (who may or may not have arrived in Hong Kong after the detainee) who were detained pending decisions under section 13A(1) to grant or refuse them such permission were granted or refused such permission within periods shorter than the period of the person's detention. (*Added 52 of 1991 s. 2*)

(2) Every person detained under this section shall be permitted all reasonable facilities to enable him to obtain any authorization required for entry to another state or territory or, whether or not he has obtained such authorization, to leave Hong Kong.

(3) Where a person is detained under subsection (1) after a decision under section 13A(1) to refuse him permission to remain in Hong Kong as a refugee, such person as the Director may authorize for the purpose shall serve on the detained person a notice in such form as the Director may specify notifying him of his right to apply for a review under section 13F(1). (*Added 23 of 1989 s. 3 Amended 52 of 1991 s. 2*)

(4) Notice under subsection (3) may be served

(*a*) personally, or

(*b*) by displaying it in some prominent place within the area where the person concerned is detained

in such a manner that it may be cconveniently read by him. (*Added 23 of 1989 s. 3*)

*(5) For the avoidance of doubt, it is hereby declared that any person detained under subsection (1) in any place may, under the authority of the Director of Immigration, be transferred from that place and detained in any other place or places specified by the Director of Immigration. (*Added 52 of 1991 s. 2*)

(6) Notwithstanding subsection (5), a person detained under subsection (1) in a detention centre shall not be transferred from that detention centre to another detention centre on the ground that his transfer is necessary in the interests of order or good management in the first mentioned detention centre unless the Director of Immigration has

(*a*) certified that his transfer is so necessary; and

(*b*) caused written notice to be served on the person informing him of the ground on which he is to be so transferred. (*Added 52 of 1991 s. 2*)

(7) A certificate purporting to be signed by the Director of Immigration stating that the transfer, from one detention centre to another, of a person detained under subsection (1) is necessary in the interests of order or good management in the detention centre in which the person is detained shall be admitted in evidence in any proceedings on its production without further proof and, until the contrary is proved, shall be presummed to have been signed by the Director of Immigration. (*Added 52 of 1991 s.* 2)

(8) If, before 31 May 1991, any person detained under

*Note: As to operation of section 13D(5), see 52 of 1991 section 1(2) and (3).

subsection (1) in any place was, under the authority of any public officer other than the Director of Immigration, transferred from that place and detained in any other place specified by that public officer, the Director of Immigration shall be deemed to have delegated that public officer to exercise on his behalf the powers conferred on him in that respect. (Added 52 of 1991 s. 2)

(*Added 42 of 1982 s. 7*)

13DA. Appeals against transfer on ground of order or good management

(1) If

(*a*) any person detained under section 13D(1) is transferred from one detention centre to another, and

(*b*) the Director of Immigration has certified that the transfer is necessary in the interests of order or good management in the detention centre from which he was transferred,

the person may appeal against the transfer to the officer appointed by the Secretary for Security under section 13H(2) to have control and management of the detention centre from which he is transferred (the "relevant officer")

(2) A person who wishes to appeal under subsection (1) shall serve written notice of appeal, stating his grounds of appeal and the facts upon which he relies, upon the superintendent of the detention centre to which he is transferred, within 48 hours after his transfer to that detention centre; but such notice shall not preclude the person from raising other facts prior to the determination of his appeal by the relevant officer and relying upon those facts.

(3) An appeal under subsection (1) shall be considered by the relevant officer, who may confirm, vary or cancel the transfer.

(4) A decision of the relevant officer under subsection (3) shall be final.

(5) In this section, "superintendent of the detention centre" means the person appointed to be in charge of the detention centre by the officer appointed by the Secretary for Security under Section 13H(2) to have control and management of the detention centre.

(*Added 52 of 1991 s. 3*)

13E. Removal from Hong Kong of Vietnamese refugees and persons detained under section 13D

(1) The Director may at any time order any Vietnamese refugee or person detained in Hong Kong under section 13D to be removed from Hong Kong.

(2) An immigration officer or a chief immigration assistant may remove from Hong Kong in accordance with section 24 any person order to be removed from Hong Kong under subsection (1). (*Amended 65 of 1989 s. 3*)

(*Added 42 of 1982 s. 7*)

13F. Review by a Refugee Status Review Board

(1) Any person on whom a notice is served under section 13D(3) may, within 28 days of such service, apply to the Board to have the decision that he may not remain in Hong Kong as a refugee reviewed.

(2) An application for a review under this section may be made on behalf of a child by his parent or any person having care of the child.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No.

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

DECLARATION OF EM VAN VO

I, Em Van Vo, declare:

1. My name is Em Van Vo. My current residence is at 6408 Beatline Dr., Long Beach, Mississippi. I am a citizen of the United States and a native of Vietnam, born on October 10, 1950 in Da Nang, Central Vietnam.

2. In 1969, I married Nam Thi Nguyen. We have four children, three daughters and one son, who are all also natives of Vietnam. My three daughters are: Truc Hoa Thi Vo, born in 1970; Truc Trang Thi Vo, born in 1974; and Truc Nhung Thi Vo, born in 1977. Our son is Thanh Chi Vo, born in 1978.

3. My wife, my daughter, Truc Trang, and my son reside with me in Long Beach. My daughter, Truc Nhung, resides in Vietnam. My daughter, Truc Hoa, resides in the High Island Detention Center in Hong Kong, where she has been living in captivity since July 1991.

4. Before the fall of Saigon in 1975, I was a corporal in the Navy of the Republic of Vietnam (NRVN). I had

joined the NRVN in 1969 and, from 1971 to 1975, I served at Naval Headquarters for the First Strategic Zone in Da Nang. During this time, I was assigned to accompany U.S. military advisers on a patrol boat whose mission it was to escort and protect the transfer of ammunition from the U.S. Naval fleet to Da Nang Port. During some of these missions, we intercepted and arrested fishermen who trespassed into military security zones. A number of these fishermen were imprisoned after police investigation revealed that they were communist infiltrators.

5. After the communist takeover of South Vietnam in April 1975, I was sent to a re-education camp for two weeks. One year later, in May 1976, I was denounced by several of the communist infiltrators I had previously helped to arrest and, consequently, was arrested by communist security forces on charges of having committed crimes against the revolution. I was sent to a re-education camp where I was imprisoned for the next 15 months and forced to do hard labor from dawn to dusk.

6. After my release in August 1977, my activities were closely monitored by the communist security forces. During the remaining time that I spent in Vietnam, I eked out a meager existance as a fisherman and plotted my escape from the country.

7. On June 24, 1979, I escaped Vietnam by boat, leaving my family behind. Following my escape, life became even more difficult for my wife and children who were barely able to survive off the money my wife made by selling fish in the market.

8. In October 1980, I was resettled in the United States. For the next ten years, I dreamed of re-uniting with my wife and children.

9. Finally, in July 1990, my wife escaped to Hong

Kong with my son. One year later, in July 1991, my daughter, Truc Hoa, escaped to Hong Kong with her husband, Vui Van Phan, and the elder of her two children. My other daughter, Truc Tran, escaped with Truc Hoa on the same boat. Truc Hoa was pregnant when she escaped and her third child was born in Hong Kong in October 1991.

10. In September 1992, my wife, my son and my daughter, Truc Tran, were permitted to immigrate to the United States based on my status as a U.S. Citizen. My other daughter, Truc Hoa, remains incarcerated in the High Island Detention Center, having been denied refugee status by the Hong Kong Immigration Department.

11. On October 29, 1991, I filled out an I-130 petition for an immigrant visa for Truc Hoa and filed the completed form with the Immigration and Naturalization Service ("INS") on October 31. (Exhibit A) Also, on October 29, I filed an Affidavit of Relationship with the United States Catholic Conference. (Exhibit B) In or around early April 1993, I was informed by the INS that my petition for Truc Hoa had been approved.

12. On April 20, 1993, John Olson, a Refugee Officer with the Joint Voluntary Agancy ("JVA") (the agency which administers the U.S. refugees program in Hong Kong), wrote to inform me that Truc Hoa "can be interviewed for admission to the United States," but that "before we can approve your relatives to join in the United States, you must prepay their transportation and visa fee costs." He further advised me that as soon as payment is credited "and your relatives have been determined to be eligible for immigrant visas to the United States, action will be taken to arrange for their departure from Hong Kong. You will be notified of the place and time of their scheduled destination so that you may meet them when they arrive in the U.S." (Exhibit C) In accordance with this request, I prepaid Truc Hoa's transportation and

visa fee costs, completed the necessary forms, and forwarded them to the JVA in Hong Kong. (Exhibit D)

13. On December 15, 1993, however, Mr. Matthew Victor, a refugee officer of the U.S. Consulate General in Hong Kong, wrote to inform me that the Consulate General would not process Truc Hoa's visa application in Hong Kong and that if she wanted to join her family in tho United States she would first have to return to Vietnam. (Exhibit E) I was confused, angered and saddened by Mr. Victor's letter. I could not understand why the Consulate General was refusing to process my daughter's case and asking her to return to Vietnam when, just six months before, the JVA had informed me that she was eligible to be interviewed for an immigrant visa. I was so upset that I could neither work nor sleep.

14. I am extremely worried and distressed that my daughter remains detained in Hong Kong. I have not seen her for more than fifteen years and long to be reunited with her and to see my grandchildren who I have never met. I am also very concerned for my daughter's and her family's well-being because I have heard about how deplorable the conditions are in the camps in Hong Kong and how dangerous it is to live there.

15. My daughter is unwilling to return to Vietnam. She left Vietnam at great risk seeking freedom and a chance to reunite with her family in the United States. Seh is unwilling to go back to Vietnam to face an uncertain future and without any guarantee that the communist authorities will permit her to leave the country.

16. I, Em Van Vo, declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in conformity with 28 U.S.C. § 1746 in Long Beach, Mississippi, on February 16, 1994.

_____

Em Van Vo

JOINT VOLUNTARY AGENCY
U.S. REFUGEE
PROGRAM • HONG KONG

April 20, 1993

Vo Van Em
6408 Beatline Dr
Long Beach, MS 39560

Dear Mr Vo

Re: Vo Thi Truc Hoa (4) IV#1992515039

This is is to inform you that the above-mentioned persons can be interviewed for immigrant visas for admission to the United States. However, before we can approve your relatives to join you in the United States, you must prepay their transportation and visa fee costs.

As of October 1, 1988, transportation and visa fees must be paid in advance for all persons entering the United States on Immigrant Visa Petitions, including those from East Asian refugee camps, as well as directly from Vietnam under the Orderly Departure Program. Family members in the U.S. who have filed Immigrant Visa Petitions (Form I-130) vith the Immigration and Naturalization Service on behalf of their relatives in Vietnam or in first asylum camps will be required to prepay the transportation and visa fee costs before their relatives can be approved for departure from Vietnam or countries of first asylum.

As of November 1, 1991 the visa fee is currently US$ 200.00 per person, and the cost of transportation from

Hong Kong is US$ 634.00 for each person over twelve years of age.

Elimination of the past practice of issuing transportation loans for travel of immigrants from Southeast Asia will bring the above policy into conformity with worldwide policy.

Your certified check or money order made payable to the *International Organization for Migration (IOM)* in the amount of US$ 2,456.00 should be mailed as soon as possible to the following address:

International Organization for Migration
Attn: Immigrant Program
1123 Broadway, Suite 717
New York, New York 10010

In order to ensure that notice of the receipt of payment is correctly attributed to your relatives, please write the case numbers on the check and enclose the duplicate copy of this letter with your payment.

Please remember that approval for your relatives' departure from Hong Kong will not be given unless your payment has been received by IOM. For this reason, you should send IOM your certified check or money order as soon as possible.

As soon as your payment has been credited to IOM's account, and your relatives have been determined to be eligible for immigrant visas to the United States, action will be taken to arrange for their departure from Hong Kong. You will be notified of the place and time of their scheduled destination so that you may meet them when they arrive in the U.S.

In the event that your relatives are determined not eligible for immigrant visas, all prepaid transportation fees will return to you. The visa fees will be forfeited.

Thank you for your timely action in assisting your family's departure from Hong Kong.

Sincerely

_____

John Olson
Refugee Officer

CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

HONG KONG

December 15, 1993

Vo Van Em
6408 Beachline Road,
Long Beach, MS

RE: Vo Thi Truc Hoa VRD 481/82/91

Dear Mr. Em:

I am writing in connection with the immigrant visa request of your daughter, Vo Thi Truc Hoa. According to our records, you filed an F-3 family preference visa petition on Hoa's behalf on October 31, 1991. The F-3 visa petition for Hoa is now current, which means the immigrant visa case can be processed.

The U.S. government supports the Comprehensive Plan of Action (CPA) governing the screening of asylum seekers in Hong Kong. Under the CPA, those not recognized as refugees as defined by international criteria must return to Vietnam to pursue resettlement in a third country. Vo Thi Truc Hoa has not been granted refugee status. Since she has been screened out, she must therefore return to Vietnam.

However, since Hoa is the beneficiary of a current immigrant visa petition, she is eligible to apply for a U.S. immigrant visa once she returns to Vietnam. She may process her immigrant visa application through the Orderly Departure Program (ODP) which operates through the U.S. Embassy in Bangkok. After Hoa departs Hong Kong, we will transfer her file to ODP.

For more information on the ODP program, you may contact the ODP office. Their address is:

ORDERLY DEPARTURE PROGRAM
9th Floor Panjabhum Building
127 South Sathorn Tai Road
Bangkok 10120 Thailand

I am sorry that I cannot assist Vo Thi Truc Hoa to pursue her visa request here in Hong Kong. I can assure you, however, that my colleagues in the ODP program will afford her the utmost courtesy consistent will U.S. law. I hope that you and Hoa will soon be reunited in the United States.

Sincerely,

Matthew Victor
Refugee Officer

cc: JVA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

AFFIDAVIT OF SHEPARD C. LOWMAN

District of Columbia:

Shepard C. Lowman, being duly sworn, deposes and says:

1. My name is Shepard C. Lowman. I reside at 3101 Chichester Lane in Fairfax, Virginia.

2. Much of my professional life has been devoted to Vietnam and the plight of the Vietnamese boat people. From 1957 to 1988, I was a career Foreign Service Officer in the Department of State. From February 1966 to June 1970, 1 served in Vietnam on loan to the Agency for International Development. From February to June 1973 and again from July 1974 to April 1975, I served as a Political Officer in the U.S. Embassy in Saigon.

3. From late 1975 to early 1982, I was assigned to the Bureau for Refugee Programs and placed in charge of the implementation of the Department's Indochinese Refugee Program. During the latter part of this period,

I carried the title of Deputy Assistant Secretary of State. From June 1986 to January 1988, I was Director of the Office of Vietnam, Laos and Cambodia Affairs in the Bureau of East Asia and Pacific. I retired from the Department in 1988 with the grade of Minister Counselor in the Senior Foreign Service.

4. Following my retirement, I served for about one year as the President and Executive Director of Refugees International where I continued to be actively involved in Indochinese refugee affairs, attending the International Conference on Indochinese Refugees in Geneva in June 1989. In 1991, I joined the Migration and Refugee Services of the United States Catholic Conference (MRS/USCC), where I am now serving as Director of International Refugee and Immigration Affairs. In my work with MRS/USCC, I have continued to be engaged in matters concerning Southeast Asian refugees.

5. With the fall of Saigon to North Vietnamese forces in April 1975, an historic migration of refugees out of Indochina began. The first wave of these, some 130,000 refugees, immediately preceded or accompanied the fall of Saigon. In May 1976, the Attorney General approved a small program enabling the admission to the United States of an additional 11,000 Vietnamese refugees. For a brief period, it was thought that this group represented the final exodus of refugees from Vietnam, but as communist rule tightened and hundreds of thousands were imprisoned or forcibly relocated to barren new economic zones, the pressure to leave grew and a steady flow of boat people developed. To accommodate this flow, the Department approved a new admission program for 14,000 refugees in August 1977, which was followed by yet another new admission program in early 1978.

6. The Vietnamese invasion of Cambodia in December 1978 and the Sino-Vietnamese border conflict immediately thereafter heightened tensions in the region and led the Hanoi regime to commence a deliberate campaign of expulsion of its Chinese population. Some 250,000 Vietnamese of ethnic Chinese origin fled Vietnam to China and hundreds of thousands more left Vietnam by boat to Hong Kong and Southeast Asia. Fearing that they would be left to absorb a permanent population of Vietnamese refugees, Malaysia and Thailand began forcing boats back to sea and countless thousands lost their lives. In response to this crisis, the Secretary General convened and the United Nations High Commissioner for Refugees chaired the first International Conference on Indochinese Refugees in Geneva in June 1979. The agreement that was reached at this conference brought the crisis largely under control for the next several years. As part of the solution, all of those fleeing communist rule in Indochina were accorded presumptive refugee status. The regional states agreed that they would not refuse first asylum to these refugees and the resettlement states agreed to a dramatic increase in their admissions quota. The United States alone admitted almost 14,000 Vietnamese refugees per month for the next two years and significant numbers thereafter.

7. During the period from 1979 to 1989, if a refugee applicant from Vietnam were qualified as an immigrant, the Department of State would admit such applicant as an immigrant in order to make available refugee admissions stretch further to meet the need. Thus, the Department regularly processed current visa petitions for persons fleeing communist rule in Indochina, despite the fact that such persons were regarded as illegal aliens by many of the countries of Southeast Asia. It is my understanding that this practice continued until

agreement was reached on the Comprehensive Plan of Action ("CPA") in June 1989 and, at least in the case of Hong Kong, until September 1993, for the beneficiaries of current immigrant visa petitions.

8. As time passed, resistance to an indefinite continuation of the Indochinese Refugee Program began to develop among many of the concerned first asylum and resettlement states. This resistance was heightened by the perception that growing number of these asylum seekers were not qualified as refugees under the 1951 Geneva Convention Relating to the Status of Refugees.

9. 1n 1987 and 1988, a new wave of tens of thousands of boat people fled Vietnam, resulting in pushbacks by Thai and Indonesian marine police and threatening the fragile consensus that had been reached ten years before. Responding to a massive increase in new arrivals, the Hong Kong Government announced that as of June 15, 1988, it was revoking the boat people's presumptive refugee status, and that, henceforth, all newly arriving boat people would be treated as illegal aliens. These illegal aliens would be detained and screened by local immigration authorities to determine whether they qualified for refugee status on a case by case basis. Following the Hong Kong precedent, the first asylum states in Southeast Asia and the resettlement countries agreed to implement a procedure of individualized adjudications for all Vietnamese boat people arriving after an agreed upon cut-off date in March 1989.

10. At an International Conference on Indochinese Refugees held in Geneva in June 1989, this arrangement was memorialized by participating states in the form of an informal agreement known as the Comprehensive Plan of Action ("CPA"). While the plan of action embodied in the CPA has guided U.S. policy with respect to the resettlement of the Vietnamese boat people since

June 1989, it has no formal status in U.S. law, having never been submitted to the U.S. Senate for confirmation nor made the subject of an Executive Order.

11. Under the terms of the CPA, if the immigration authorities of a first asylum state determine that a Vietnamese applicant is qualified for refugee status under the Geneva Convention, the United States is committed to work with other resettlement countries to assure their resettlement. However, under the Immigration and Nationality Act, as amended by the Refugee Act of 1980, such persons may not be admitted by the United States as refugees unless they are first interviewed and found qualified for such status by United States immigration officials. On the other hand, no such interview by INS officers can take place until the applicant has been found qualified for refugee status by host country immigration officials. Thus, the United States, under the CPA, has forfeited its right to resettle as refugees, persons regarded as refugees by the INS, but not so regarded by immigration officials in first asylum countries.

12. The CPA provides that "Persons determined not to be refugees should return to their country of origin in accordance with international practices reflecting the responsibilities of States towards their own citizens. In the first instance every effort will be made to encourage the voluntary return of such persons." This section of the Agreement creates an implied commitment that countries of origin will receive back their citizens and that countries of resettlement will not resettle *as refugees* persons determined not to qualify for such status by host country immigration officials.

13. The CPA does not provide specifically for the return of those persons determined not to be refugees, but who do not choose to return voluntarily. It does state, however, that "If, after the passage of reasonable

time, it becomes clear that voluntary repatriation is not making sufficient progress towards the desired objective, alternatives recognized as being acceptable under international practices would be examined." While the CPA does not define such acceptable international practices, the phrase has been widely interpreted by states as including, under certain circumstances, the possibility of the forcible return of asylum seekers found not to be refugees. As time has passed, some first asylum states have become impatient with the progress of voluntary repatriation and significant pressure has developed for a policy of forcible return.

14. In the case of Hong Kong, the implementation of the screening policy together with a harsh new detention policy initially did little to stem the flow of newly arriving boat people. Between June 15, 1988 and the end of 1989, over 44, 000 Vietnamese asylum seekers arrived in Hong Kong. Asylum seekers and others who arrived later have been forced to endure deplorable conditions of detention since the formation of the closed camp system in 1988. Rather than being operated as normal refugee camps, the Hong Kong camps have operated as large prison-like detention centers. These detention centers have been plagued by intense overcrowding and United Nations standards for per capita space have been routinely violated. Most of Hong Kong's camps are covered with concrete and surrounded by high chain link fences topped by rolls of barbed concertina wire. Children who have grown up in the camps have been completely isolated from the outside world. The failure to give adequate authority to leaders in the refugee community has lead to a breakdown in law and order in which rape, robbery, extortion and intimidation have become routine. Observers believe that many asylum seekers have returned home to Vietnam voluntarily simply because they have feared for the safety of their

families in the camps. The Government of Hong Kong has earned serious condemnation for its management of these camps.

15. Having had little, if any, success in stemming the tide of new arrivals, the Hong Kong Government moved to implement a policy of forcible return beginning in December 1989. Since that time, this policy has consisted of the intermittent use of deportation of small groups in order to maximize the pressure on others to repatriate voluntarily. Thus, any person who has been determined not to be a refugee in Hong Kong is subject to the possibility of a forcible return to Vietnam and to date approximately 300 Vietnamese boat people have been forcibly returned. Eventually, the Hong Kong screening, detention, and forced repatriation policies succeeded in ending the flow of illegal emigration. In 1990, over six thousand boat people arrived in Hong Kong as compared with thirty four thousand the year before. In 1991, this number jumped again to twenty thousand but, since 1991, less than one hundred, Vietnamese boat people have fled to Hong Kong by boat. Nonetheless, as of this date, there are still more than 29,000 Vietnamese boat people detained in Hong Kong.

16. While the CPA explicitly calls for a return "to their country of origin" of those "determined not to be refugees," it sets forth that policy in the overall context of a quasi-judicial process of refugee status determination. The CPA does not speak to the processing of immigrant visa applicants or the holders of other migration documents such as humanitarian parole or non-immigrant visas issued on grounds not related to refugee status. There was, to my knowledge, no discussion of this issue in the negotiation of the CPA and it is not treated in any of the documents related to the International Conference on Indochinese Refugees. Accordingly, if a

nation wishes to issue a visa on other than refugee status grounds and the first asylum nation agrees to the departure of the person in question on the basis of such a document, it would be an event outside of the jurisdiction or scope of the CPA.

17. In fact, such events have occurred regularly in Hong Kong. Prior to the adoption of the CPA, I was assured by Hong Kong officials that if the United States wished to accept persons for family reunification reasons, such wishes could be accommodated. These assurances have been realized through the establishment of a family reunification track which runs parallel with the refugee status adjudication track.

18. I am informed by competent observers of the Hong Kong refugee situation that the Hong Kong Immigration Department has followed a practice whereby, once it is understood that an applicant qualifies for resettlement to the United States on the basis of immigration criteria, such applicant is rejected for refugee status by both the original examining officer and by the Hong Kong Refugee Status Review Board ("RSRB"). The purpose of this practice is to avoid spending the time of Hong Kong officials on such cases since they are permitted to depart Hong Kong in any event as immigrants pursuant to section 13D(2) of the Hong Kong Immigration Ordinance, which provides as follows:

> Every person detained under this section shall be permitted all reasonable facilities to enable him to obtain any authorization required for entry to another state or territory or, whether or not he has obtained such authorization, to leave Hong Kong

19. Until recently, the Department of State implemented this family reunion track. Hong Kong Immigration automatically approved for family reunion close

relatives (defined as spouses and unmarried children under the age of twenty-one) of refugees already accepted for U.S. resettlement on a "following to join" basis. Most such cases were accepted by INS as refugees. In addition, the Department processed the applications and issued immigrant visas to asylum seekers who were the beneficiaries of current immigrant visa petitions. Neither the Hong Kong Immigration Department nor the United Nations High Commissioner for Refugees voiced any objections to this procedure and immigrant visas were regularly processed until approximately September 1993 without incident.

20. In short, until approximately September 1993, if a Vietnamese asylum seeker in Hong Kong was the beneficiary of a current immigrant visa petition, such petition would be processed by the U.S. Consulate General in Hong Kong, regardless of whether such asylum seeker had been recognized as a refugee by the Hong Kong Immigration Department. If, following such processing, the applicant was issued an immigrant visa, the Hong Kong Government allowed the beneficiary of that petition to depart for the United States either on the basis of its family reunion program or in accordance with section 13D(2).

21. In or around September 1993, however, the Department of State abruptly, and without warning, changed its practice under more than four years of the CPA of processing current immigrant visa applications of Vietnamese boat people in Hong Kong. On September 24, 1993, the U.S. Consulate General in Hong Kong notified the Hong Kong Immigration Department of this change in U. S. policy, stating that:

> We have received clear instructions from the Department of State in Washington, D.C., that we are only authorized to process the immigrant visa cases

> of persons recognized as refugees. We may not process the immigrant visa request of anyone awaiting a screening decision. We also may not process the case of anyone screened-out as a refugee. This stipulation holds regardless of whether the person in question is a beneficiary of a current U.S. visa petition. The U.S. government will not as a rule resettle screened-out asylum seekers and will as a rule not invoke Section 13(d)(2) of Hong Kong law. (Exhibit A)

On December 22, 1993, the Consulate General wrote to the Chairman of Hong Kong's Refugee Status Review Board clarifying the U.S. policy not to resettle persons not recognized as refugees. (Exhibit B)

22. In accordance with this change in policy, the U.S. Consulate General began sending letters to the beneficiaries of current immigrant visa petitions in Hong Kong, notifying them that their petition is now current but that it cannot be processed in Hong Kong. These letters state, in part, that:

> The U.S. government supports the Comprehensive Plan of Action (CPA) governing the screening of asylum seekers in Hong Kong. Under the CPA, those not recognized as refugees as defined by international criteria must return to Vietnam to pursue resettlement in a third country. You have not been granted refugee status. Since you have been screened out, you must therefore return to Vietnam.
>
> However, because you are the beneficiary of a current U.S. immigrant petition, you are eligible for an immigrant visa interview when you return to Vietnam.

Samples of such lettere are attached as Exhibit C.

23. I am aware of over 90 Vietnamese asylum seekers now in Hong Kong who are the beneficiaries of current immigrant visa petitions and believe the number is likely to be a good deal larger and certain to grow over time. The Department's decision to refuse processing of these Vietnamese nationals in Hong Kong is extremely detrimental to their interests. After enduring a dangerous flight by boat and years of extreme hardship in overcrowded and dangerous detention facilities, these persons are now told they must return to the land from which they fled, before they can join their loved ones in the United States. The great majority of the boat people cut their ties with home before they left. Jobs and property were abandoned. In some cases, no family was left behind. In others, family members in Vietnam will be unable or unwilling to support the returnees. Many fear that their lives and freedom will be threatened in Vietnam. In view of the serious flaws in the Hong Kong government's screening process and its practice of automatically denying the refugee claims of applicants when it is informed by the U.S. Consulate that they are eligible to immigrate to the United States, this fear will sometimes be well-founded. Finally, experience has demonstrated that it can take years to persuade many boat people to return to Vietnam and that a significant number of others will not go back unless forced.

24. For those immigrant visa beneficiaries who do return to Vietnam and wish to apply for resettlement through the Orderly Departure Program ("ODP"), many are likely to experience significant difficulties. This program permits immigrant visa beneficiaries to register for interviews in Ho Chi Minh City and, if approved, to depart to join their families in the United States. However, there is no guarantee that the Government of the Socialist Republic of Vietnam will, in fact, issue an exit permit to the immigrant visa beneficiary and no interview with INS will take place until such an exit permit has been issued. In the case of those who married in Hong Kong, the acquisition of such an exit permit may prove impossible as the Hanoi regime does not recognize overseas marriages.

25. Even if successful, the effort to obtain an exit permit is a difficult one and the bureaucratic hurdles are formidable, time-consuming and often expensive. Assuming that an exit permit is finally obtained, the ODP process itself is lengthy and the immigrant visa beneficiary could expect to wait many months more before actually leaving Vietnam to join his or her family.

26. During all of this time, the applicant will need to find some way to survive economically, while enduring the stress of an uncertain future and a generally hostile and discriminatory environment for returnees with family abroad. Thus, a requirement that an applicant return home and pursue in Vietnam his or her rights as a current immigrant visa beneficiary poses real hardship in every case and, in others, may result in persecution or denial of the right to reunite with one's family.

_____

Shepard C. Lowman

Sworn to me this 24th
day of February, 1994

_____

JUANITA STEVENSON
Notary Public, District of Columbia
My Commission Expires September 14, 1995

CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

HONG KONG

September 24, 1993

MR. K. M. YIM
Principal Immigration Officer
Hong Kong Immigration Department (HKID)
Vietnames Refugee Section
New Kowloon Plaza
Room 1122 F, 11/F
38 Tai Kok Tsui Road
Kowloon, Hong Kong

Dear Mr. Yim

I am writing in order to clarify U.S. policy towards resettlement of asylum seekers and the use of Section 13(d)(2) of Hong Kong law.

As a signatory to the 1989 Comprehensive Plan of Action (CPA), the United States agreed to the principle that persons not recognized as refugees in first asylum countries should not be resettled in third countries. However, in the past, the U.S. government on occasion invoked Section 13(d)(2) to process the immigrant visa case of someone who was the beneficiary of a current U.S. immigrant visa petition, despite the fact that he/she was denied refugee status in Hong Kong.

We have received clear instructions from the Department of State in Washington, DC, that we are only authorized to process the immigrant visa cases of persons recognized as refugees. We may not process the immigrant visa request of anyone awaiting a screening

decision. We also may not process the case of anyone screened-out as a refugee. This stipulation holds regardless of whether the person in question is a beneficiary of a current U.S. visa petition. The U.S. government will not as a rule resettle screened-out asylum seekers and will as a rule not invoke Section 13(d)(2) of Hong Kong law.

The use of 13(d)(2) will be limited in the future to those persons recommended for resettlement in the United States by the US Committee For Vulnerable Persons.

I hope this information is of use.

Sincerely,

Matthew C. Victor
Refugee Officer

cc: Mr. Brian Bresnihan, Refugee Coordinator
Mr. C.M. Lo, Director
Mr. Blackwell, Chairman

CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

HONG KONG

December 22, 1993

MR. F. M. Blackwell
Chairman
Refugee Status Review Board
Room 905, Tsia Sha Tsui Centre
66 Mody Road
Kowloon, Hong Kong

Dear Mr. Blackwell,

Recently this office began responding to referrrals from the Vietnamese Vetting Section of Hong Kong Immigration in cases involving screened out asylum seekers (in the first and/or second instance) with the following statement:

The U.S., as a signatory to the 1989 Comprehensive Plan of Action (CPA), will not resettle persons not recognized as refugees. This stipulation holds regardless of whether the person in question is a beneficiary of a current U.S. visa petition.

This statement is no way intended to indicate a reluctance on the part of the United States Government to resettle those persons granted refugee status by the Hong Kong Immigration Department or the Refugee Status Review Board, or receiving UNHCR mandate. In fact, a person who is a beneficiary of a current U.S. visa petition and has been recognized as a refugee may pursue their immigrant visa request here in Hong Kong.

I hope this information is of use.

Sincerely,

Matthew Victor
Refugee Officer

cc: JVA

CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

HONG KONG

December 16, 1993

MR. Tran Quoc Toan
1211 Oakland Street
Fort Wayne, IN 46808

RE: Tran Quoc Thai VRD 45/1/91

Dear Mr. Toan:

I am writing in response to your recent letter concrning the status of your brother, Mr. Tran Quoc Thai. According to our records, you filed an F-4 family preference visa petition on his behalf on June 16, 1982. The F-4 visa petition for Thai is now current, which means the immigrant visa case can be processed.

The U.S. government supports the Comprehensive Plan of Action (CPA) governing the screening of asylum seekers in Hong Kong. Under the CPA, those not recognized as refugees as defined by international criteria must return to Vietnam to pursue resettlement in a third country. Tran Quoc Thai has not been granted refugee status. Since he has been screened out, he must therefore return to Vietnam.

However, since Thai is the beneficiary of a current immigrant visa petition, he is eligible to apply for a U.S. immigrant visa once he returns to Vietnam. He may process his immigrant visa application through the Orderly Departure Program (ODF) which operates through the U.S. Embassy in Bangkok. After Thai

departs Hong Kong, we will transfer his file to ODP. For more information on the ODP program, you may contact the ODP office. Their address is:

ORDERLY DEPARTURE PROGRAM
9th Floor Pajabhum Building
127 South Sathorn Tai Road
Bangkok 10120 Thailand

I am sorry that I cannot assist Tran Quoc Thai to pursue his visa request here in Hong Kong. I can assure you, however, that my colleagues in the ODP program will afford his visa application the utmost courtesy consistent with U.S. law. Yesterday I met with Thai in the detention center where he is being held and discussed his case in great detail. During that meeting I urged him to consider volunteering to return to Vietnam in order to pursue his immigrant visa request through the U.S. ODP program.

I know this is difficult news to hear, but I hope it is helpful to you in advising your brother. I hope that you and Thai will soon be reunited in the United States.

Sincerely,

Matthew Victor
Refugee Officer

cc: JVA

CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

HONG KONG

December 30, 1993

Ms. Pam Baker
Knight & Ho, Solicitors & Notaries
Rooms 1001-7, 1009, 906 & 909
Ritz Building
625 Nathan Road
Kowloon, Hong Kong

Dear Pam:

I am responding to your December 29 letter concerning the immigrant visa case of Vu Thi Hoa, VRD 234/91.

The decision to recognize whether or not a person is a refugee as defined by internationally accepted criteria is guided by the Comprehensive Plan of Action (CPA). After interviewing Ms. Hoa, the Hong Kong Immigration Department (HKID) determined that she was not a refugee. She appealed this decision to the Refugee Status Review Board, which affirmed the HKID decision.

The US Government supports the CPA. The screening process in Hong Hong is part of the CPA. Under the CPA, those who are screened out will not be resettled. The only option for the screened out is to return to Vietnam.

According to our records, the (IR-1) visa petition for Vu Thi Hoa is now current, which means the immigrant

visa case can be processed. However, unless a person has been screened in as a refugee, the individual must return to Vietnam to have the immigrant visa case processed by the Orderly Departure Program (ODP). Since Ms. Hoa has been screened out, she must therefore return to Vietnam to have her case processed.

The UNHCR sponsors a voluntary repatriatin program for those who believe their best option is to return to Vietnam. I suggest that Ms. Hoa talk with a UNHCR field officer and apply for the voluntary repatriation program as soon as possible, in order to be reunited with her husband.

Sincerely,

_____

Matthew Victor
Refugee Officer

cc: JVA

CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

HONG KONG

January 4, 1994

Lam Ky
VRD 800/23/89
Tai A Chau Detention Centre
Hong Kong

Dear Ms. Ky:

I am writing in connection with your immigrant visa request. According to our records, Tai Lam filed a I-R1 family preference visa petition on your behalf on December 2, 1992. Your I-R1 visa petition is now current, which means the immigrant visa case can be processed.

The U.S. government supports the Comprehensive Plan of Action (CPA) governing the screening of asylum seekers in Hong Kong. Under the CPA, those not recognized as refugees as defined by international criteria must return to Vietnam to pursue resettlement in a third country. You have not been granted refugee status. Since you have been screened out, you must therefore return to Vietnam.

However, because you are the beneficiary of a current U.S. immigrant petition, you are eligible for an immigrant visa interview when you return to Vietnam. You may pursue your immigrant visa application through the Orderly Departure Program (ODF) which operates through the U.S. Embassy in Bangkok. After you depart Hong Kong, we will transfer your file to ODP.

For more information on the ODP program, you may contact the ODP office. Their address is:

ORDERLY DEPARTURE PROGRAM
9th Floor Pajabhum Building
127 South Sathorn Tai Road
Bangkok 10120 Thailand

I am sorry that I cannot assist you to pursue your visa request here in Hong Kong. I can assure you, however, that my colleagues in the ODP program will afford you the utmost courtesy consistent with U.S. law. I hope that you and Tai Lam will soon be reunited in the United States.

Sincerely,

Matthew Victor
Refugee Officer

cc: JVA

CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

HONG KONG

January 5, 1994

Nguyen Thi Anh
VRD 754/4/89
High Island Detention Centre
Hong Kong

Dear Ms. Anh:

I am writing in connection with your immigrant visa request. According to our records, Phan Minh Mei filed a I-R1 family preference visa petition on your behalf on December 17, 1992. Your I-R1 visa petition is now current, which means the immigrant visa case can be processed.

The U.S. government supports the Comprehensive Plan of Action (CPA) governing the screening of asylum seekers in Hong Kong. Under the CPA, those not recognized as refugees as defined by international criteria must return to Vietnam to pursue resettlement in a third country. You have not been granted refugee status. Since you have been screened out, he must therefore return to Vietnam.

However, because you are the beneficiary of a current U.S. immigrant petition, you are eligible for a immigrant visa interview when you return to Vietnam. You may pursue your immigrant visa application through the Orderly Departure Program (ODP) which operates through the U.S. Embassy in Bangkok. After you depart Hong Kong, we will transfer your file to ODP.

For more informatin on the ODP program, you may contact the ODP office. Their address is:

ORDERLY DEPARTURE PROGRAM
9th Floor Pajabhum Building
127 South Sathorn Tai Road
Bangkok 10120 Thailand

I am sorry that I cannot assist you to pursue your visa request here in Hong Kong. I can assure you, however, that my colleagues in the ODP program will afford you the utmost courtesy consistent with U.S. law. I hope that you and Pham Minh Hai will soon be reunited in the United States.

Sincerely,

Matthew Victor
Refugee Officer

cc: JVA

CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

HONG KONG

January 5, 1994

Mr. Pham Minh Hai
95 Belvista Dr
Rochester, NY 14625

RE: Nguyen Thi Anh VRD 754/4/89

Dear Mr. Hai:

I am writing in connection with the immigrant visa request of your wife, Nguyen Thi Anh. According to our records, you filed an I-R1 family preference visa petition on Anh's behalf on December 17, 1992. The IR-1 visa petition for Anh is now current, which means the immigrant visa case can be processed.

The U.S. government supports the Comprehensive Plan of Action (CPA) governing the screening of asylum seekers in Hong Kong. Under the CPA, those not recognized as refugees as defined by international criteria must return to Vietnam to pursue resettlement in a third country. Nguyen Thi Anh has not been granted refugee status. Since she has been screened out, she must therefore return to Vietnam.

However, since Nguyen Thi Anh is the beneficiary of a current immigrant visa petition, she is eligible to apply for a U.S. immigrant visa when she returns to Vietnam. She may process her immigrant visa application through the Orderly Departure Program (ODF) which operates through the U.S. Embassy in Bangkok. After Anh departs Hong Kong, we will transfer her file to ODP. For more information on the ODP program, you may contact the ODP office. Their address is:

ORDERLY DEPARTURE PROGRAM
9th Floor Panjabhum Building
127 South Sathorn Tai Road
Bangkok 10120 Thailand

I am sorry that I cannot assist Nguyen Thi Anh to pursue her visa request here in Hong Kong. I can assure you, however, that my colleagues in the ODP program will afford her the utmost courtesy consistent with U.S. law.

Sincerely,

Matthew Victor
Refugee Officer

cc: JVA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 94-0361 (SSH)

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

SUPPLEMENTAL AFFIDAVIT OF DANIEL WOLF

District of Columbia:

Daniel Wolf, being duly sworn, deposes and says:

1. My name is Daniel Wolf. I am attorney of record for Plaintiffs in this action and am submitting this affidavit in connection with Plaintiffs' application for a temporary restraining order.

2. On February 25, 1994, this action was filed following four weeks of fruitless discussions between myself and my co-counsel, Robert B. Jobe, representing the Plaintiffs, and various officials of the Department of State. In virtually everyone of these discussions, Mr. Jobe and I emphasized the importance of the Department taking immediate action to reverse its illegal practice of refusing to process the current immigrant visa petitions of Vietnamese nationals detained in Hong Kong. We stated that immediate action was essential because our clients were: (1) at risk of being forcibly repatriated to Vietnam or of voluntarily repatriating

because they had been erroneously informed that the Department could not process their visa applications in Hong Kong; and (2) needlessly languishing in detention under deplorable and dangerous conditions because the Department had refused to process their visas.

3. Our discussions with the Department commenced on January 28, 1994, when Mr. Jobe and I telephoned Diane Dillard, Deputy Assistant Secretary for Consular Affairs, and raised with her the U.S. Consulate General's practice of refusing to process the current immigrant visa petitions of Vietnamese nationals detained in Hong Kong and Southeast Asia. We further informed Ms. Dillard that in our view this practice violated the Immigration and Nationality Act and the controlling regulations, and that it was our intent to file an action in U.S. District Court seeking to compel the Department to comply with the law. Ms. Dillard responded that she was aware of the Department's practice and would act promptly to review it. She then requested that we provide her the names of individuals whose visas had been processed in Hong Kong prior to the decision to reverse the Department's practice in approximately September 1993. We informed Ms. Dillard that we would attempt to gather a list of such individuals, but that there were hundreds of them and she could easily ascertain their names by contacting the Post in Hong Kong.

4. On February 2, 1994, we telephoned Ms. Dillard again to inquire about the results of her review. Ms. Dillard informed us that she had been waiting for us to provide her a list of names, despite the fact that those names were readily available to her through official channels had she chosen to use them. We then gave Ms. Dillard a list of several Vietnamese nationals whose immigrant visas had been processed at the U.S.

Consulate in Hong Kong and urged her to take swift action to reverse the Department's policy. After our conversation, we sent Ms. Dillard a copy of a letter dated September 24, 1993 from Matthew Victor, Refugee Officer for the U.S. Consulate in Hong Kong, to K.H. Yim, Principal Immigration Officer of the Hong Kong Immigration Department, informing Mr. Yim that henceforth the U.S. Consulate would "not process the immigrant visa request of anyone awaiting a screening decision [or] screened-out as a refugee." (Exhibit A.)

5. On February 4, I telephoned Ms. Dillard again. Ms. Dillard informed me that the information that we had provided her two days before had been helpful, particularly the letter from Mr. Victor to Mr. Yim. She further informed me that she saw no justification for the practice of refusing to process immigrant visas in Hong Kong and would recommend that the practice be reversed.

6. On February 8 or 9, Mr. Jobe and I telephoned Ms. Dillard again. During this conversation, Ms. Dillard assured us that the Department had sent guidance to the U.S. Consulate in Hong Kong instructing it to reverse its practice of refusing to process Vietnamese boat people in Hong Kong. Ms. Dillard further assured us that the U.S. Consulate would send letters to Vietnamese nationals who had been erroneously informed that they would have to return to Vietnam to have their cases processed that, in fact, their cases could be processed in Hong Kong. We agreed that this process should not take more than seven days.

7. On February 10, 1994, we sent (by facsimile transmission) a letter to Ms. Dillard proposing "a framework for resolving the problem which has developed in connection with the processing of immigrant visa petitions of Vietnamese boat people in Hong Kong and Southeast Asia." (Exhibit B.) The letter specifically stated that we

had "refrained from filing our complaint in U.S. District Court, because it is our impression that you are taking prompt action to reverse its existing practice." We emphasized the hardship that our clients were facing in detention and the risk of repatriation to Vietnam, "while the Department reconsiders its policy." The letter concluded:

> We have already twice delayed the decision to file our complaint. If it appears that a settlement along the terms we have suggested is reasonably within reach, we will again delay our February 11 target date for filing. However, we are not prepared to delay this filing indefinitely and will need to reach a final agreement in the very near future.

8. On approximately February 14, Mr. Jobe and I telephoned Ms. Dillard to follow-up on our letter of February 10. We asked Ms. Dillard whether she had raised this issue with the Department's attorneys and she confirmed that she had. I asked her whether we should contact Catherine Brown, Assistant Legal Adviser for Consular Affairs. Ms. Dillard stated that she was being advised by an attorney in the Department of Justice and that we should speak with him instead. She told us that she would call us the following day with his name and number. However, Ms. Dillard did not call with that information on February 15 or 16.

9. On February 16, Mr. Jobe and I telephoned Matthew Victor at the U.S. Consulate in Hong Kong. Mr. Victor informed us that, contrary to the information we had received from Ms. Dillard, the Department had not instructed the Post to reverse its practice of refusing to process immigrant visa applications of Vietnam detainees in Hong Kong.

10. On February 17, I telephoned Ms. Dillard and

informed her of Mr. Jobe's and my conversation with Mr. Victor. She informed me once again that the cable instructing the Post to change its practice would be sent out that day or the next day. During this conversation, Ms. Dillard also informed me that the attorney with whom she was consulting at the Department of Justice was Thomas Hussey of the Office of Immigration Litigation.

11. Immediately after my conversation with Ms. Dillard on February 17, Mr. Jobe and I telephoned Mr. Hussey to determine whether his client intended to resolve this matter without the need for litigation. Mr. Hussey informed us that the Department of State had made no decision to reverse its existing practice, but that it had the matter under review. He further informed us that the Department would complete its review in the normal course and that its timetable would not be dictated by a lawsuit or the threat of a lawsuit.

12. Based on our conversations with Mr. Victor and Mr. Hussey, we sent (by facsimile transmission) another letter to Ms. Dillard on February 17 "to ascertain whether it will be possible to reach an agreement with the Department concerning the reversal of the Department's practice of refusing to process the current immigrant visa petitions of Vietnamese nationals detained in Hong Kong and Southeast Asia." (Exhibit C) In this letter, we reviewed the events of the past three weeks and, "in view of the dire consequences that our clients experience with each day's delay," urged the Department to accept a proposed timetable for implementing each of the steps necessary to bring about a complete reversal of its illegal practice. Finally, we informed Ms. Dillard that we were available to meet with her to iron out the terms of an agreement, but that if no such agreement could be reached by February 22, "we will have no choice but to file an action in U.S. District Court."

13. On February 18, Mr. Jobe and I called Catherine Brown, Assistant Legal Adviser for Consular Affairs, to inform her of our intention of filing suit against the Department. Ms. Brown was not in the office, so we left a message with her colleague, James Hergen, asking that he inform her of the pending suit. On February 22, Ms. Brown called us and requested that we once again delay filing our complaint in order to give the Department further opportunity to review its policy. We stated that we were not inclined to forebear any longer, but that we would agree not to file on the condition that the Department give us certain assurances of prompt and enforceable action. At Ms. Brown's request, we agreed that we would sent her a copy of our draft complaint.

14. On February 23, I sent Ms. Brown a copy of our complaint. On the same day, she sent me a letter stating that "the Department has this matter under review and hopes to complete its review by the end of the week," but agreeing to none of the conditions that I had set forth in our February 22 conversation. (Exhibit D)

15. On February 24, Mr. Jobe and I sent (by facsimile transmission) a letter to Ms. Brown reviewing the events of the last four weeks. In this letter, we explained why we were unwilling to delay the filing of our complaint any longer as follows:

> [T]he Department has already been reviewing this matter for four weeks. Moreover, various officials within the Department have made contradictory remarks concerning the status and results of that review. Accordingly, we do not believe that it is in our clients' interests to await the outcome of the Department's deliberations, which based on our experience to date, we are not confident will be prompt or favorable.
>
> (Exhibit E).

16. On February 25, the day after it received an advance copy of our complaint, the Department of State cabled its Hong Kong and Southeast Asian consular posts asking that they take certain measures to preserve the status quo during the pendency of the Department's review of its policy with respect to processing immigrant visa petitions for screened-out Vietnamese asylum seekers. On February 25, the Department sent a second cable to its consular posts stating that they should initiate normal visa processing of such asylum seekers.

17. On February 25, Bernadette Sargeant of the U.S. Attorney's office telephoned me and informed me that the Department had cabled the posts with instructions relevant to this action. She stated that in her view these cables rendered our application for a temporary restraining order moot, but refused my suggestion that we file a consent order incorporating the relevant terms of the two cables and including more specific emergency relief on behalf of several members of the Detained Plaintiff class due to be forcibly repatriated on March 8. In view of Defendants' refusal to agree to a consent order, I sent (by facsimile transmission) a letter to Ms. Sargeant on February 28 enclosing a draft stipulation and offering "to withdraw our motion for a temporary restraining order on the condition that you agree to file an enforceable stipulation with the court." (Exhibit F) Defendants, however, have refused to sign any such stipulation.

18. At approximately 10:30 a.m. this morning, March 1, I received a facsimile transmission from John Bates, Chief, Civil Division, U.S. Attorney's Office (Exhibit G). Mr. Bates declined to enter into a stipulation. He offered to represent that the Department would not countermand the instructions contained in the two cables mentioned above without 48 hours notice pending briefing of the preliminary injunction motion, if we agree to combine the preliminary injunction hearing with the hearing on the merits and to an expedited briefing schedule (to be completed by March 22). He did not address the question of the members of the Detained Plaintiff class who face forcible repatriation to Vietnam on March 8. I then telephoned Ms. Sargeant and informed her that Mr. Bates proposal is not acceptable, but that in principle we had no objection to consolidating the preliminary injunction hearing with the merits.

_____

Daniel Wolf

Sworn to me this 1st
day of March, 1994

_____

Jenifer K. Price
My Commission Expires 10/31/95

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No.

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

AFFIDAVIT OF WAYNE S. LEININGER

1. I. Wayne S. Leininger, am Chief of the Consular Section at the American Consulate General in Hong Kong. In this capacity I supervise the operations of the immigrant visa unit and our refugee office. I am a named defendant in the above-captioned proceeding.

2. Pursuant to instructions from the Department of State (State 48852) received by me at opening of business February 28, I on that date instructed Refugee Office Matthew Victor to request the Hong Kong Government to make available for interview at the Consulate General immigrant visa applicants residing in the refugee camps when their cases progressed to that stage of processing. In reply, Mr. Brian Bresnihan, Refugee Coordinator for the Hong Kong Government, stated that, in keeping with HKG policy, an individual would be released from the camps for visa interview only upon assurance from the Consulate General that a visa would be issued and the person resettled in the United States. Mr. Bresnihan repeated this position to me in a subsequent meeting on March 1. On both occasions he was informed that it was impossible to provide advance guarantees of visa issuance, since this was a question that could only be answered definitively once the interview had taken place.

3. Previously, on February 25, in accord with instructions from the Department (State 46562), I had instructed Mr. Victor to convey the USG concern that no U.S. immigrant visa beneficiaries be among those scheduled for involuntary return to Vietnam under the Hong Kong Government's Orderly Return Program. Mr. Bresnihan replied that though there had been ten names for the March 8 flight on the long list from which ORP candidates were selected, only three (one of whom had a dependent child) were on the final roster. Absent a guarantee from the Consulate General that they would be issued visas or otherwise be resettled in the United States, Bresnihan continued, they could not be exempted. This was a position he was to repeat again to Mr. Victor on February 28, and to me in our March 1 meeting. Of those scheduled for the March flight, two (Pham Thi An Hong and Ho Thi Xuan) have pending visa applications with the Consulate General that are "current" (i.e., do not face a period of waiting before a priority date is reached); one (Huynh Thi Hong Hanh, with her child) is the beneficiary of a relative relationship petition filed by her legal permanent resident spouse, with a priority date that does not qualify her for further processing at this time.

4. On March 3, I learned via a faxed copy of a letter from Mr. Bresnihan to local attorney Pam Baker (representing the visa petition beneficiaries in question) that, in a reversal of Mr. Bresnihan's previously-expressed position, the Hong Kong Government would facilitate the appearance of the two "current" visa applicants at the Consulate General, were the Consulate General sim-

ply to confirm that an interview was scheduled. Ms. Baker promptly inquired of the Chief of the Visa Unit, Bernard Alter, as to what was required in order to have such an interview scheduled.

5. Mr. Alter advised Ms. Baker that, as in all immigrant visa cases, an interview could not be scheduled until and unless the applicant has in hand all the required personal and civil documents required for visa processing, and has so informed the Consulate General.

6. These documents are specified in a set of instructions ("Packet 3") provided to visa applicants as their cases achieve or approach "current" processing status. Pham Thi An Hong had been sent Packet 3 on May 10, 1993; Ho Thi Xuan on June 28, 1993. The Consulate General had no record of a positive response from either applicant. Ms. Baker stated that the applicants had already supplied certain of the required documents to the office of the Joint Voluntary Agency (JVA). Members of my staff have retrieved the JVA file for each applicant, reviewed the documents on file, and have advised Ms. Baker's office as to any deficiencies that have been noted. To the best of my knowledge, Ms. Baker is at this time assisting the applicants in completing their document portfolios. On Friday afternoon, March 4, a member of her staff confirmed that the applicants have or will before the interview have the required documents, and an appointment for interview has been scheduled for Monday morning, March 7.

7. No guarantees have been or can be made as to the issuance of the visas (neither to the Hong Kong Government nor to Ms. Baker) prior to the interview and formal evaluation of the supporting documents presented by the applicants. This has been explained to the Hong Kong Government, and to Ms. Baker.

8. On March 4, 1993, I contacted Mr. Bresnihan to determine whether the decision of the Hong Kong Government to facilitate the appearance of the two visa applicants in question constituted a one time exception to, or a reversal of, its previous policy of insistence upon a guarantee of resettlement from the concerned foreign consulate. Mr. Bresnihan confirmed that in the future, all visa applicants with scheduled visa interviews at the Consulate General will be permitted to appear for them and for their required medical examinations without any such prior assurances.

9. With respect to the list of ten cases brought to the Court's attention by plaintiff's counsel as scheduled for departure on the March 8 ORP flight, the attached chart is provided for the Court's information. It sets out, to the best of my knowledge, the current status of each of these individuals with respect to scheduled return to Vietnam and to U.S. immigrant visa processing.

10. I affirm under penalty of perjury that the above statements are true to the best of my knowledge and belief.

_____

Wayne S. Leininger

Sworn to me this 4th
day of March, 1994

_____

Donna J. Anderson, American Consul

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No.

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

AFFIDAVIT OF WAYNE S. LEININGER

1. I. Wayne S. Leininger, have been a Foreign Service Officer for over 22 years. I have spent nearly twelve years of that time serving overseas as a consular officer, including tours of duty in charge of the consular sections in Moscow, Tel Aviv, and, at the present time, at the U.S. Consulate General in Hong Kong. In this capacity I supervise a section comprising 13 American officers and 45 Foreign Service National Employees. Included in this number are Mr. Bernard Alter, Chief of the Visa Section, and Mr. Matthew Victor, Refugee Officer. I have complete access to the consular records of this post. I assumed my duties in Hong Kong in late July of 1993, after extensive consultations with my two immediate predecessors in this position, and with the Office of Chinese and Mongolian Affairs in the East Asian and Pacific Bureau of the Department of State. I am qualified to comment upon the immigrant visa policies and practices at the U.S. Consulate General in Hong Kong.

2. The screening of the claims to refugee status of Vietnamese boat people in Hong Kong under the

Comprehensive Plan of Action (CPA) is a three-tiered process. At first instance, the Hong Kong Immigration Department (HKID), applying the criteria of the Refugee Handbook of the U.N. High Commissioner for Refugees (UNHCR), makes a determination of refugee status. If the applicant is found not to be a refugee (i.e., is "screened-out"), he or she may appeal that finding to the Refugee Status Review Board (RSRB), an independent body made up of persons twenty percent of whom are local academics; thirty percent of whom are civil servants; and fifty percent of whom are lawyers not connected with the Hong Kong Government. If the applicant is denied refugee status on appeal, he or she still has recourse to request that the local UNHCR office exercise its mandate and in that way to become "screened-in". While the UNHCR does not become involved in the initial screening of refugees in Hong Kong (unlike its role in several other countries of first asylum in the region), it does actively monitor the outcome of cases as processed by HKID and RSRB, and it has not hesitated to use its mandate to assure that the final decisions are in accord with internationally-accepted standards. Ultimately, the same screening standards—UNHCR's standards—prevail in Hong Kong as elsewhere, regardless of the intervening screening steps.

3. The U.S. Immigration and Naturalization Service (INS) office in Hong Kong does not play a role in the screening process. It is, however, still the final arbiter, under U.S. law, of who actually is granted refugee status for the purpose of admission to the United States. It does generally accord great weight to the findings produced through the local screening procedure. It has been my observation that this from time to time is a factor that works in favor of the individual asylum-seeker. The director of the Hong Kong INS has in fact informed

me that his office commonly accords U.S. refugee status to cases screened in through the Hong Kong process that it would not have accepted were the individuals not to have been so recommended. Contrariwise, INS offices are not absolutely bound to accept a candidate screened-in under the CPA process. Some 95 individuals recommended for refugee status under the Hong Kong procedures are currently still in transit camps in the Philippines, having been rejected for admission to the United States by INS Manila (which has jurisdiction over the cases of those Vietnamese who were relocated out of Hong Kong to the Regional Processing Center there).

4. My understanding of the practice at the U.S. Consulate General in Hong Kong with respect to the processing of the immigrant visa applications of screened-out petition beneficiaries—based on a review of post files and consultations with my predecessors, before my arrival, and with colleagues on the scene, since—is as follows: Prior to 1989 and the advent of the CPA, such cases were not an issue, since there was no screening process and all arrivals from Vietnam were granted presumptive refugee status by the Hong Kong Government, and could be considered as candidates for resettlement by third countries. After the parties to the CPA in June of 1989 agreed to standards and a procedure that would distinguish refugees from non-refugees, the Department of State (hereinafter "the Department") in August of that year directed Hong Kong and other posts in first asylum countries to seek access to beneficiaries of current immigrant visa petitions, and to applicants seeking (pursuant to Section 207(c)(2) of the Immigration and Nationality Act, 8 USC 1157(c)(2), and 8 CFR 207.1(e)) to join spouses or parents previously admitted as refugees ("VISAS 93"

cases) before any final local screening as to refugee status was made (89 State 243430, Attachment 1). This was to avoid any conflict with CPA principles in dealing with cases that might have ended up screened-out. It was made clear in this message that any such special mechanisms put in place for these immigrant petition beneficiaries was to be considered to be of a temporary nature until the Orderly Departure Program (ODP) became a fully effective exit route for eligible immigrant cases.

5. In December of 1990, in light of what were then continuing uncertainties as to emigration out of Vietnam, the Department authorized the posts in the region for the first time to process the case of immigrant visa applicants who had formally been "screened-out". Still wary of a policy that would require applicants to return to Vietnam for processing, the Department nevertheless expressed recognition of the potential desirability of a regime under which all Vietnamese immigrant visas would be processed through ODP, and committed itself to periodic review of the matter (90 State 422906, Attachment 2).

6. In November of 1991 the Department took the next step in the evolution of its policy, and directed that posts in countries of first asylum accept for processing only the cases of immigrant visa applicants who had been screened-in under CPA criteria. Those who were screened out were to be advised to return to Vietnam and pursue their applications through ODP (91 State 383039, Attachment 3).

7. Notwithstanding these instructions, Consulate General records reveal that this post processed fourteen cases in this category (comprising twenty-three individuals) from the period from November, 1991, to April, 1993, or something less than one a month. Though thousands of Vietnamese left the camps in Hong Kong for

the United States during this period, the vast majority of them actually screened-in as refugees themselves; were qualified "VISAS 93" following-to-join applicants; or were screened-in refugees-cum-immigrants (that is, persons who could have qualified for refugee status, but who also qualified for and were issued immigrant visas pursuant to 8 CFR 207.1(d), in order to conserve the limited supply of refugee admission numbers).

8. To allow the processing of immigrant visas for those who were screened-out, the post, notwithstanding the principle that eligibility for a visa can only be determined after a personal interview and presentation of the personal and civil documents required by law, gave advance assurance of resettlement of these individuals to the Hong Kong Government, in satisfaction of the latter's then-precondition to the release of the applicants from the camps for those interviews. A copy of a typical exchange of letters between the Consulate General and the Hong Kong Government on such a case, involving clause 13(D)(2) of the Hong Kong Immigration Ordinance (which requires the Hong Kong Government to facilitate the efforts of a detainee to obtain departure documents to another country, and requires it to release such a person from custody for onward travel if s/he is successful), is attached this affidavit (Attachment 4). The expectation of resettlement politely expressed in the Hong Kong Government's letter is in fact its explicit reminder to the Consulate General of its policy during the period in question. Given the inappropriateness of granting advance assurance of resettlement in any instance, and especially in light of indications that marriage fraud is a growing phenomenon among those in the camps, this Consulate General is no longer able to provide such guarantees to the Hong Kong Government. Fortunately, in early March of 1994, the Hong

Kong Government's Refugee Coordinator informed me that such guarantees would no longer be demanded as a precondition to release of an individual for an immigrant visa medical examination or personal interview.

9. In April of 1993, after an exchange of cables in which this post argued that it should be permitted to continue making exceptions to the region-wide policy of not processing immigrant visa applications from the screened-out, the Department instructed the post to cease doing so (93 State 127427, Attachment 5). With the exception of two cases in process, in which visas were actually issued in May, and one final exception undertaken at explicit Department direction in November/December 1993, there have been no other immigrant visas issued to a screened-out immigrant visa applicant at this post since April of 1993.

10. I have read the affidavit of Shepard C. Lowman submitted to the court in support of the plaintiffs' filing in the above-captioned case. In paragraph 7 and elsewhere he alludes to a change of policy and practice at this post dating from September, 1993. As already described, the policy in question dates from November of 1991, and the post practice of making exceptions to that policy stopped for all practical purposes as of April, 1993. Two events of September 1993 could have created an impression that a change in the Consulate General's IV processing policy took place in September of 1993, however. First, we discovered several instances in which the relative relationships that ostensibly served as the basis for entitlement to refugee status as VISAS 93 following-to-join family members had in fact been formed subsequent to the principal refugee's entry to the United States, not prior to it, as the regulations require. We were obliged to terminate processing of those cases. Secondly, we found that we had to inform

several individual IV applicants who came forward seeking appointment interviews for immigrant visas that we could not—under the Department's April, 1993 instructions—continue the processing of their cases. By this means we discovered that there had been no proper general notification to this group of individuals of that fact, and so in September Mr. Matthew Victor, our refugee officer, began searching our data base of pending immigrant visa cases and informing in writing those who had been screened-out as refugees that we could not continue to process their applications.

11. At several points in the materials filed in support of plaintiffs' case reference is made to seeming contradictions between the message contained in Mr. Victor's letters announcing the cessation of processing and other letters bearing his name (or that of his predecessor) on the letterhead of the Joint Voluntary Agency (JVA), in which petitioners or beneficiaries were informed that a given case could and would be processed at this post. The Hong Kong JVA, which is affiliated with the Lutheran Immigrant Relief Service, is a private organization funded by the United States Government under a cooperative agreement to assist refugees in being resettled in the United States. It properly helps those screened-in as refugees to pursue immigrant visas if they are also entitled to immigrant status. I am aware of no authorization for JVA to continue to be involved in the immigrant visa applications of those who have been screened-out. Moreover, I am aware of no authorization given JVA at any time to sign letters on behalf of and using the name of an officer assigned to this Consulate General. Finally, all such letters giving assurance to the screened-out that their immigrant visa applications would be processed at this Consulate General that were dispatched subsequent to our April, 1993 guidance from

the Department were not in conformity with either the policy or practice of this post, said policy and practice of which JVA previously had been made aware.

12. Mr. Lowman in paragraph 18 of his affidavit and elsewhere asserts that the Hong Kong Government pursues a policy of routinely screening-out those asylum-seekers who become known to it as having U.S. relative relationships. To my knowledge, and as confirmed to me by the Hong Kong Government's Refugee Coordinator (Attachent 6), the Hong Kong Government has never had such a policy. Rather, during the period in which the Consulate General was under instructions to seek to process cases before refugee determinations were made (see paragraph 4), and in the interregnum in which the Consulate General was itself not in compliance with the Department's processing guidelines, HKID would, in such a circumstance, suspend the determination process. It did so since it had the Consulate General's assurance that the individual would otherwise be resettled, saw nothing to be gained by slowing down the individual's departure by persisting in what seemed to be an unnecessary screening decision, and—as Mr. Lowman correctly notes—preferred to devote its screening resources to cases that still required them. The HKID monitored the progress of these cases, and if for any reason such an individual whose screening was suspended did not acquire immigrant status, the screening procedure was resumed without prejudice. In point of fact, as compliance with CPA strictures with respect to the non-resettlement of the screened-out directly from countries of first asylum came to be regarded more seriously both by the Consulate General and by the Hong Kong Government, the HKID did, upon our advising it in several instances of existing U.S. relative relationships, reverse previous "screened-out" decisions to

"screened-in", solely to enable us to process the immigrant visa applications that were pending.

11. The "family reunification track" to which Mr. Lowman refers in paragraphs 17 and 19 does still exist. The Hong Kong Government has regarded and continues to regard spouses and minor children of those who have been resettled as refugees as refugees themselves—provided that the relative relationship existed prior to the principal refugee's resettlement. Similarly, Consulate General Hong Kong has facilitated and continues to facilitate the entry of such eligible applicants—those with pre-existing relative relationships—under the "VISAS 93" procedure, which implements Section 207(c)(2) of the Immigration and Nationality Act. The reason there has been a decline in the numbers of individuals resettled under this rubric is not due to any change of U.S. or Hong Kong Government policy, but rather to the fact that, over time, the bulk of the population in the camp eligible for the program has already been resettled. As noted previously, non-refugees in the camp whose relative relationship was established after the resettlement of the principal refugee in the United States are not and have never been eligible for this program.

12. It would perhaps be useful to place the numbers of people involved in this matter into some kind of perspective. I have already noted the number of cases (14) and people (23) who benefitted from the exceptions made in the past by this post to the policy regarding non-processing of the immigrant visa applications of the screened-out. From 1975 through January, 1994, the United States accepted for resettlement 54,338 Vietnamese refugees directly from the camps in Hong Kong, and another 16,030 from Hong Kong who traveled via the regional processing center in the Philippines.

Since the voluntary repatriation program was instituted—which embodies cash and other resettlement assistance provided by UNHCR—41,663 Vietnamese have voluntarily departed camps in Hong Kong for Vietnam (out of a worldwide total that approaches 60,000.) As of March 11, 1994, an additional 849 Vietnamese have been returned by the Hong Kong Government under its Orderly Return Program (involuntary repatriation). I am not aware of a single verified instance in which any of the returnees from Hong Kong have been subject to persecution in Vietnam.

13. I affirm under penalty of perjury that the above statements are true to the best of my knowledge and belief.

_____
Wayne S. Leininger

Subscribed and sworn to before me this 15th day of March, 1994

_____
Clyde L. Jones
Consul of the United States

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Visa
Ref: Hong Kong 17367 (NOTAL)

1. Department appreciates Post's thoughtful and thorough presentation, in REFTEL, regarding the case of a screened out Vietnamese boat person who subsequently married an American citizen and became the beneficiary of an IR-1 Immigrant Visa Petition. The essential question posed by Post is whether this visa case should be processed to completion in Hong Kong or sent back to Vietnam to be handled through the orderly departure program.

2. The relevant facts are as follows: A) this individual's case has been handled fully in compliance with the CPA and a final status determination has been made; (B) the marriage to an American citizen that made subject eligible to apply for an immigrant visa took place after her status determination; C) the INS approved an IR-1 petition based on that marriage; D) Post in REFTEL raised no questions regarding the bona fides of the marriage, and E) Post notes that under the Hong Kong government's regulations we can request subject for release from detention, for purposes of immigration.

3. As Post points out, we have processed immigrant cases out of the Hong Kong asylum seeking population when their potential immigrant status is discovered during screening. The only difference between those and the subject case is that subject became eligible for IV consideration after the screening had been completed.

4. The alterative to processing subject's immigrant visa application to conclusion in Hong Kong would be for UNHCR to counsel her to return voluntarily to Vietnam. If she agreed, file would then be transferred to ODP in Bangkok, subject would have to obtain Vietnamese exit permit, SRV would have to advise us she had exit permission, ODP would schedule her for interview in Ho Chi Minh City and, if approved she

would be manifested to depart and a few months later leave for the United States. This strikes Department as procedural overkill and not at all necessary to preserve the integrity of the CPA.

5. Post maintains in REFTEL paragraph five that processing subject's IV case in Hong Kong would contravene the CPA because subject has been determined to be a non-refugee. That would of course be true if we were proposing to resettle her as a refugee. However, she would be coming as an immigrant and, as Post reports in REFTEL, all major resettlement countries have made similar requests to release detainees for immigration.

6. As a general rule, if a Vietnamese boat person qualifies for U.S. immigration, and the first asylum country permits us to process the case, the U.S. does not want to use the CPA to block or delay immigrant visa processing. The uncertainties of emigration from Vietnam are still sufficient to make us wary of promoting a policy which would require return of currently eligible immigrants to that country for processing. Nevertheless, Department recognizes the potential desirability of a regime where all Vietnamese IV's would be processed through ODP, and we will keep the matter under periodic review.

7. As for Post's concerns that processing this case that the procedure of releasing asylum seekers from detention for the purpose of immigration is unique to Hong Kong and therefore will not create a precedent for other first asylum countries. Department doubts that American citizens in significant numbers would come to Hong Kong to marry boat people and then file immi-

grant visa petitions for them. As for those who do, each case should be considered on its merits for marriage bona fides, at both the petition approval and visa application stages. Cases involving fraudulent marriages should not be processed. But if the claimed relationship appears legitimate, Department sees no problem with post processing such cases to conclusion. It is also Department's understanding that it is the policy of Canada, and perhaps other countries, to process immigrant cases irrespective of screening decisions.

7. Post should request subject individual's release from detention and accept for processing her immigrant visa application. (RP/RAP/SEA:28161) Baker

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No.

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS, ("LAVAS"), ET. AL., *PLAINTIFFS*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *DEFENDANTS*.

AFFIDAVIT OF MATTHEW C. VICTOR

1. I, Matthew C. Victor, am Refugee Officer at the American Consulate General in Hong Kong. I have held this position since June 28, 1993. In this capacity I manage the Department of State's refugee program in Hong Kong and monitor the work of the Joint Voluntary Agency for Refugees (JVA). In my day-to-day activities I report to Bernard Alter, Chief of the Visa Section. I am a named defendant in the above-captioned proceeding.

2. As this post's refugee officer I am tasked, among other duties, with monitoring living conditions for asylum seekers in Hong Kong. To this end, I meet frequently with Hong Kong Government, United Nations, and international organization officials to discuss the welfare of the camp population. Every two weeks I visit Hong Kong detention facilities, where I am able to observe up close the living conditions of camp residents.

3. The latest wave of Vietnamese boat people entering Hong Kong began in 1988. This influx peaked in 1989, when an average of close to 100 asylum seekers a day landed in Hong Kong. Local officials were at times in

the past hard pressed to accomodate all the new arrivals. Partly as a result, Hong Kong detention facilities gained a reputation for being overcrowded and crime-ridden prisons. In 1991 Hong Kong was housing well over 60,000 asylum seekers. As the number of arrivals began to decrease (12 in 1992) and people began to return voluntarily to Vietnam (12,612 in 1992 alone), however, the overcrowding problem began to improve dramatically. The latest figures show that Hong Kong houses 28,589 asylum seekers in facilities designed to accomodate 43,224.

4. As a result of the earlier international criticism, the Hong Kong government increased the numbers and training of security personnel, placed rival ethnic and social groups in separate detention facilities, improved social and medical facilities available to detainees, and began including camp leaders in decision-making wherever possible. In 1988 the government agreed to United Nations High Commissioner for Refugees (UNHCR) oversight of camp conditions. The UNHCR in Hong Kong has a full time protection officer whose sole duty is to monitor conditions in Hong Kong's Indochinese detention facilities. UNHCR does not publish a report or make public statements on conditions in camp. They do, however, provide periodic briefings to representatives of foreign countries on living conditions in detention. During my time as refugee officer, UNHCR has never indicated to me that they have major concerns about the living conditions faced by Vietnamese asylum seekers in Hong Kong. When I contacted the UN protection officer last week for an update, he indicated that this position has not changed.

5. The Hong Kong government has developed programs to improve medical, social, and educational facilities available to those in camp. Primary education is

guaranteed for all, something which is not the case in Vietnam. There are also many job training programs asylum seekers may participate in. The standard of medical care has been improved to such an extent that many local observers say that it is at least as good if not better then what is available to the average Hong Kong resident. Camp management organizes many social activities for camp residents.

6. The allegations made in the papers filed with the court that crime in the camps is rampant is no longer accurate. According to crime statistics for the years 1991, 1992, and 1993 for Whitehead Detention Centre, the largest of Hong Kong's detention camps, which contains more than 50% of the Indochinese asylum seekers here, the total number of crimes reported fell from 844 in 1991 to 588 in 1992 to only 130 last year in a population that remained at about the same level for all three years. Based on the 1992 figures, there was an average of 2,365 crimes reported per 100,000 people. In comparison, the United States experienced 5,660 crimes per 100,000 people in 1992. Whitehead's overall crime rate thus appears to be about 60% lower than the United States' rate. In fact, there was not one state in the Union that had a lower crime rate than Whitehead in 1992, according to the World Almanac (The World Almanac and Book of Facts 1994, Copyright Pharos Books, 1993, page 966).

7. Regarding the incidence of violent crime at Whitehead, there were four murder cases and two reports of rape in 1992. This amounts to 16.1 murders and 8 reported rapes per 100,000 persons. In comparison, the United States experienced 9.3 murders and 42.8 reported rapes per 100,000 persons in 1992. Although Whitehead's murder rate was higher than the total U.S. rate, it was on a par with Louisiana (16.9 in 1991, the

last year for which statewide totals are available) and Texas (15.3 in 1991). Washington DC's murder rate in 1991 was 80.6 per 100,000 persons. The incidence of rape (8 versus 42.8 per 100,000 persons in 1992) is considerably lower in Whitehead than in the United States, again according to the World Almanac.

8. Living conditions in detention are not ideal. Hong Kong government and UN officials attempt, however, to make a concerted effort to provide the basic necessities of life. Medical care and food are avaialble free of charge.

Educational and social activities are widely available. Crime in detention is low and continues to decline. The number of crimes reported in Whitehead dropped 78% in 1993 and also seems to be decreasing as a percentage of overall crime.

9. I affirm under penalty of perjury that the above statements are true to the best of my knowledge and belief.

_____

Matthew C. Victor

Sworn to me this 15th
day of March, 1994

_____

Clyde L. Jones, American Consul

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 94-0361(SSH)

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

AFFIDAVIT OF BRUNSON MCKINLEY

1. I, Brunson McKinley, am a Deputy Assistant Secretary in the Bureau for Refugee Programs of the Department of State. Since 1971, I have been a career member of the U.S. Foreign Service. I have served in China, Vietnam, Europe and elsewhere. I have held my current position since October 1991. In July 1993, I assumed responsibility in the Bureau for Refugee Programs for policy questions relating to the Comprehensive Plan of Action for Indochinese Refugees (CPA). Since that time, I have been personally involved in all aspects of the U.S. government's CPA policy and its implications for U.S. foreign policy. The following information is based upon either personal knowledge or information provided to me in the course of my official duties.

2. The Comprehensive Plan of Action for Indochinese Refugees (CPA) was established by the international community in 1989 under the auspices of the United Nations High Commissioner for Refugees (UNHCR) in reaction to the continuing large outflow of boat people

from Vietnam and the consequent loss of life and growing reluctance of countries in the region to provide temporary safehaven—so-called "first asylum"—in countries of first arrival. Following the initial large-scale flight of Vietnamese in the wake of the fall of Saigon in 1975, there have been variable periods of high and low flows of boat people to first asylum countries in Southeast Asia and Hong Kong. In total, over almost 19 years, UNHCR estimates that 758,000 persons have arrived in countries of first asylum from Vietnam. Nobody knows how many people may have died en route. Some outflows—for example the 68,700 who fled to Hong Kong alone in 1979—were related to events in Vietnam (the Chinese invasion in early 1979). Numbers declined in the ensuing years, but by 1988 large numbers of Vietnamese were again arriving in the region's first asylum countries (18,000 arrivals in Hong Kong in 1988). In Thailand, boats were pushed off from shore and people drowned. It became clear that it would be necessary to deal with this long-standing problem in a manner that would both discourage further unsafe departures from Vietnam and provide secure first asylum.

3. The CPA constitutes an agreement among some 50 participating states including countries of first asylum, countries of origin (Cambodia and Laos in addition to Vietnam), countries of resettlement, and financial donor countries, coordinated by UNHCR. The CPA was devised as a comprehensive approach to addressing the Vietnamese boat people phenomenon. The intention of the framers was to establish a multilateral arrangement of burden sharing that would include commitments from all participating countries alike. The main components of the CPA were:

1) First asylum countries agreed to allow asylum seekers to land.

2) Cut-off dates would be established for automatic

eligibility for resettlement consideration (March 14, 1989, except that for Hong Kong the date is June 16, 1988).

3) A refugee status determination process (screening) was established in each first asylum country for those arriving after the cut-off dates. The governing standard for refugee status adopted was the refugee definition in the U.N. Convention and Protocol Relating to the Status of Refugees. Those who are determined to be refugees are eligible for resettlement in a third country; those determined not to be refugees would not be resettled, but would eventually have to return to Vietnam. The element of burden sharing is seen in the agreement of resettlement countries to resettle the pre-cut-off date population without screening, and to accept for resettlement those persons in the post-cut-off date population who are determined to be refugees through the screening process. It is also seen in the donor country commitment to fund daily sustenance of those in camps throughout this process.

4) The existing UNHCR Orderly Departure Program dating from 1979 for legal emigration from Vietnam (more below) was to be encouraged and promoted as the surest and safest way for bona fide refugees and qualified immigrants to depart Vietnam for resettlement abroad.

5) A voluntary return program was established to allow the screened out (and others who so chose) to return to Vietnam in conditions of safety and dignity with the assistance of UNHCR.

4. The declaration adopted at the conclusion of the CPA meeting in 1989 contains clear references to the procedures and rationale for the activities undertaken pursuant to the CPA. A complete copy of this document is attached; the following excerpts are of particular interest:

Clandestine Departures

—Extreme human suffering and hardship, often resulting in loss of lives, have accompanied organized clandestine departures. It is therefore imperative that humane measures be implemented to deter such departures, which should include the following:

Mass media activities . . . focusing on:

—The dangers and hardships involved in clandestine departures.

—The institution of a status-determination mechanism under which those determined not to be refugees shall have no opportunity for resettlement.

—Absence of any advantage, real or perceived, particularly in relation to third-country resettlement, of clandestine and unsafe departures.

—Encouragement of the use of regular departure and other migration programs.

—Discouragement of activities leading to clandestine departures.

Regular Departure Programs

—Emigration through regular departure procedures and migration programs should be accelerated and expanded with a view to making such programs the primary and eventually the sole modes of departure.

Resettlement

—Continued resettlement of Vietnamese refugees benefitting from temporary refuge in Southeast Asia is a vital component of the Comprehensive Plan of Action.

Repatriation

—Persons determined not to be refugees should return to their country of origin in accordance with international practices reflecting the responsibilities of States toward their own citizens. In the first instance, every effort will be made to encourage the voluntary return of such persons.

—If after the passage of a reasonable time, it becomes clear that voluntary repatriation is not making sufficient progress towards the desired objective, alternatives recognized as being acceptable under international practices would be examined.

5. The United States, in cooperation with other countries, decided to support the CPA from its inception in order to avoid a continuation of the tragedy of the boat people in Southeast Asia. First asylum countries in the region had been accepting asylum seekers from Vietnam for more than a decade after the fall of Saigon, but had begun to lose patience. In the absence of an international effort to stop the flow of boats from Vietnam, first asylum countries began to deal with the problem unilaterally, often resulting in loss of life. This, in turn, put them at odds with the United States and the rest of the international community. At the same time, the continuation of boat departures meant the continuation of death at sea, often at the hands of pirates.

6. Since 1989, the United States has been firm in its support of the CPA. The U.S. has provided more than $100 million in financial support through UNHCR. We have resettled in the U.S. 17,000 Vietnamese of the pre-cut-off camp population (35%) and 11,400 of the post-cut-off screened-in camp population (40%) directly from first asylum camps. In addition, the U.S. has maintained

diplomatic vigilance of others' adherence to the multilateral CPA agreement. U.S. refugee officers visit camps in the region and local communities in the United States with the message that the screened out will not be resettled and must return to Vietnam. We have also provided $3.5 million in support of U.S. non-governmental organization projects in Vietnam to assist in the reintegration of those who return.

7. The Steering Committee of the Comprehensive Plan of Action (under the chairmanship of UNHCR and made up of representatives of first asylum countries and the main resettlement countries) met in Geneva on February 14, 1994 to set the course for the completion of the CPA. The Committee noted that screening would be completed everywhere in the region in 1994 and that the vast majority of those who remained in the camps would be non-refugees. It was decided that every effort would be made to conclude the CPA by the end of 1995, including increased efforts to encourage voluntary repatriation of the screened out. The consensus statement issued by the Steering Committee also noted that, henceforth, new asylum seekers would continue to be treated in accordance with "internationally accepted practices," *i.e.*, the principle of non-refoulement, that is, non-return of a *bona fide* refugee to a country of feared persecution.

8. The United States supports the objective of ending the CPA by the end of 1995 by emphasis on voluntary repatriation. Further, the United States at the February 1994 Steering Committee meeting stated that it no longer objects in principle to the use of mandatory repatriation of those who would, in the end, refuse to return voluntarily. The United States noted, however, that, for the time being, mandatory return should not be extended beyond its present application—*i.e.*, that it should be limited to Hong Kong—in order to give volun-

tary repatriation every chance to work. The United States also stated that it would be prepared to review this issue at the end of 1994.

9. It is fundamentally important to the success of the CPA, and therefore to the Steering Committee and the United States, that Vietnamese in the camps have the clear perception that there is no alternative for the screened out but to return to Vietnam. In my judgment, anything that clouds that perception or gives birth to rumors that resettlement of the screened out is possible will reduce voluntary repatriation and create a situation in which resort to mandatory repatriation by first asylum governments is made more likely.

10. The CPA has been successful in creating an orderly process to receive and screen asylum seekers for refugee resettlement. Combined with an enhanced program for legal departures from Vietnam to countries of resettlement under the UNHCR Orderly Departure Program, this has resulted in a virtual end to boat departures and the saving of countless lives. The CPA's success has been possible in large measure because of virtually uniform adherence to the principle that those found to be refugees by the screening mechanisms established would be eligible for resettlement in third countries, while those found not to be refugees have no option but to return, ultimately, to Vietnam. United States practice with respect to the screened-out must be extremely sensitive to this policy, as any resettlement of the screened-out has the potential to seriously undermine the prospects for bringing this international program to a dignified and humane close.

11. Taking into account the CPA guidelines regarding respect for the family unit in refugee status determination, the United States has not objected to the screening

in of immediate family members of U.S. citizens and permanent residents even though these individuals may not themselves have a well-founded fear of persecution. The U.S. has, however, over time moved more and more toward drawing a line throughout the region at the resettlement as refugees from first asylum camps of anyone who has been screened out. It is my understanding that UNHCR and most first asylum governments in the region strongly believe that this line must be maintained.

12. The Department's recent decision to attempt to process the immigrant visa applications of the screened-out has elicited expressions of concern from UNHCR and first asylum countries that such a practice may provoke a reaction in the camps in Hong Kong and elsewhere in the region which could cripple the process of voluntary repatriation. First asylum government officials and UNHCR representatives, as well as officials from other resettlement countries, have indicated that taking even a limited number of screened out Vietnamese as immigrants would give virtually every other disappointed but determined asylum seeker hope for options other than repatriation and give strength to hard-core opponents of repatriation active in the camps. The anticipated impact is to undermine the credibility of the CPA statement adopted at the February Steering Committtee meeting in Geneva and to undermine the credibility of the resolve of the United States in particular. The Department of State necessarily will have to monitor this situation carefully and take these reactions into account.

13. It is important to understand that a workable alternative exists for qualified Vietnamese now in the camps who wish to immigrate to the United States. The U.S. Orderly Departure Program (ODP) constitutes an effective and safe alternative, without impacting on

other states in the region and therefore without adverse foreign policy consequences. As a reaction to the massive outflow of boat people from Vietnam in 1979, the Orderly Departure Program (ODP) was established under an agreement between UNHCR and the Socialist Republic of Vietnam to provide a safe and legal alternative to the illegal boat departures by Vietnamese seeking to emigrate to other countries.

14. Under the U.S. ODP program, which is based at the American Embassy in Bangkok, U.S. consular and Immigration and Naturalization Service (INS) officers visit Ho Chi Minh City on a regular basis to adjudicate immigrant visa and refugee applications of Vietnamese. U.S. ODP interviewing teams consist of 2-3 consular officers and 3-4 INS officers plus several contract employees present in Vietnam almost continuously, operating at a site in Ho Chi Minh City provided by the Vietnamese Government. There is a good working relationship between U.S. and Vietnamese officials overseeing the ODP, with any problems encountered in processing individual cases resolved locally. Since the inception of the U.S. ODP, over 360,000 Vietnamese have departed Vietnam to the U.S. under its auspices as immigrants, parolees, or refugees. Of these, about 160,000 persons have received immigrant visas, including about 69,000 Amerasians and their families. We anticipate that the U.S. ODP will issue about 12,000 immigrant visas in Fiscal Year 1994.

15. U.S. consular officers assigned to ODP speak Vietnamese and are thoroughly familiar with Vietnamese culture and practices, and with the civil documents required and available to complete immigrant visa applications. They are better qualified to adjudicate applications by Vietnamese than consular officers in the first-asylum countries, who may be knowledgeable only of the languages, practices, and civil documentation of their host countries.

16. Since the establishment of the CPA in 1989, Vietnamese asylum-seekers who are the beneficiaries of approved U.S. immigrant visa petitions, but who have been "screened out" under the CPA as non-refugees, have been encouraged to return voluntarily to Vietnam in order to process their visa applications through the ODP. The U.S. has sought to expedite the application process for immigrant visa applicants who repatriate by routinely putting them at the head of the processing queue in Vietnam. The American Embassy in Bangkok observes that the Vietnamese government does not impede the processing of these cases, and that on average it takes only 3-4 months for a repatriated applicant to be issued a visa by ODP in Vietnam. I am not aware of any case in which the Vietnamese government has refused to allow the departure of an individual issued an immigrant visa by ODP or of any substantiated instance in which a screened-out Vietnamese asylum-seeker who returned to Vietnam from a first-asylum country experienced persecution by the Vietnamese government. ODP immigrant visa operations dovetail with voluntary repatriations under the CPA to ensure that qualified applicants are moved through the system as quickly and efficiently as possible.

17. United States policy with regard to the CPA was designed to deal with the twin imperatives of humanitarian concern and the need to maintain a cooperative relationship with the countries in the region that would allow us to pursue our national interests in this and other areas. The CPA has been the engine of that cooperation. Any constraint on the United States Government's ability to implement immigrant visa processing in first asylum in a manner that it deems necessary to further implementation of the CPA could cause the U.S.' CPA partners to question the U.S. commitment to the CPA.

I declare under penalty of perjury that the foregoing is true and correct.

_____

Executed in Washington, D.C.
March 15, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civ. Action No. 04 0361 (SSH)

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LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS, ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

AFFIDAVIT OF ANNE WAGLEY

County of San Francisco:
State of California:

ANNE WAGLEY, being duly sworn, deposes and says:

1. My name is Anne Wagley. I am a United States citizen and reside at 127 Alvarado Road in Berkeley, California.

2. I resided in Hong Kong from September 1986 to July 1990. From September 1986 to May 1989 I served as a consultant to the International Rescue Committee of New York on the situation of Vietnamese asylum seekers. From June of 1989 to July of 1990, I was Field Assistant with the United Nations High Commissioner for Refugees in Whitehead Detention Centre, the largest of Hong Kong's detention centers.

3. As field representative for the UNHCR, I was responsible for overall coordination, development, monitoring and evaluation of all of the various programs implemented by the Hong Kong Government, the

UNHCR, and the voluntary agencies working in the detention center. These responsibilities required me to spend an average of eight to twelve hours a day at Whitehead. During this time I spoke with hundreds of Vietnamese asylum seekers concerning the procedures for determining refugee status, conditions at Whitehead, the opportunities available for resettlement abroad (or lack thereof), and the option of voluntary repatriation.

4. During the time I was in Whitehead there was a two-track system for screening: refugee status determination and family reunification determination. At the initial interview, during which family biographical data was taken, an individual could indicate that they were the beneficiary of an Immigration Visa petition for a third country. If this was the case, the second interview would be limited to the confirmation of biographical data. If there was no current petition, the individual would be screened under the refugee status procedure.

5. During the time I served in Hong Kong, it was the practice of the United States Consulate General to process as immigrants Vietnamese asylum seekers who were the beneficiaries of current immigrant visa petitions. The United States Consulate processed such cases regardless of whether the beneficiary had gone through the refugee status determination procedure, as it was not necessary for an individual to have been screened-in. As I was in constant contact with the asylum seekers, I was able to observe this practice first-hand and even assisted a number of individuals in completing processing formalities.

6. The United States Consulate processed the applications of such current immigrant visa beneficiaries, regardless of the immigrant visa category they fell under and, in at least one instance, processed the application of a Vietnamese asylum seeker who became eligible for an immigrant visa on the basis of a winning visa lottery number. I am aware of this case because I personally assisted this young man complete the necessary processing formalities, including fingerprinting and photographs. Following the completion of these formalities, the beneficiary, along with his younger sister, was removed from the detention center, interviewed by the United States Consulate and permitted to resettle in the United States.

7. Based on my first hand observations of the situation of Vietnamese asylum seekers in detention, it is my opinion that the existence of the family reunification-based immigration track had no impact in the decision of Vietnamese asylum seekers who were not beneficiaries of immigrant visa petitions to return voluntarily to Vietnam. Decisions concerning voluntary repatriation were driven by much more significant factors such as the conditions of confinement, the prospects of being screened-in as a refugee, and their perception of what their situation would be like if they returned to Vietnam. The existence of the immigration track gave no hope of resettlement to the average Vietnamese asylum seeker detained in Whitehead, since they knew that the track was based almost exclusively on family reunification and that they did not have a family relationship that would permit them to take advantage of it.

Anne Wagley

Sworn to me this
23 day of March, 1994

Barbara Paganini, Notary Public

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civ. Action No. 94-0361

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

DECLARATION OF MINH HAI

I, MINH HAI, declare:

1. My name is Minh Hai. My current residence is at 405 S. Hibiscus Way, Anaheim, California. I am the older brother of Son Ngoc Nguyen, who was previously residing in White Head Detention Center, VRD, #580/24/89/, in Hong Kong. Mr. Nguyen has recently returned to Vietnam and is currently residing in Vietnam. I have personal knowledge to the following and if called to testify in court, I would and could competently so testify.

2. In 1989, my brother fled Vietnam and sought asylum in Hong Kong. While in Hong Kong, my brother was married to Anneette Renee Ferguson, a U.S. born citizen. The marriage was officiated at the Registrar's Office in Shatin, Hong Kong, on October 28, 1992. (Exhibit A).

3. Immediately following the marriage, Ms. Ferguson, then Mrs. Nguyen, filed a visa petition for her husband, Mrs. Son Ngoc Nguyen, with the U.S. Immigration and Naturalization Service. The visa petition was approved

and was forwarded to the United States Consulate in Hong Kong ("the Consulate") for further processing.

4. On July 19, 1993, the Joint Voluntary Agency in Hong Kong informed Mrs. Nguyen that the Consulate had changed its policy and that the Consulate had stopped processing her husband's immigrant visa application.

5. Shortly thereafter, my brother received a letter from the Consulate, dated August 12, 1993, which informed him that, among other things, the Consulate would not process his immigrant visa application in Hong Kong and that he would have to return to Vietnam to proceses his application there through the Orderly Departure Program (ODP). (Exhibit B).

6. The Consulate also informed my brother that he must return to Vietnam within 90 days if he wished to apply for departure from Vietnam through the ODP. After that 90-day period, he would no longer be eligible to apply for immigrant visa through the ODP.

7. Because my brother feared that he would lose his eligibility for an immigrant visa under the ODP and he relied on the Consulate's representation that he would be allowed to apply for immigrant visa under said program, he voluntarily returned to Vietnam under the Voluntary Repatriation Program.

8. My brother returned to Vietnam on or about December 30, 1993.

9. Upon return to Vietnam, my brother immediately submitted an application for exit permit to the Vietnamese Government as the first step of applying for immigrant visa under the ODP. My brother has recently written me a letter to inform me that his application for exit permit had been rejected by the Vietnamese

Government because the Vietnamese government does not recognize a marriage performed outside of Vietnam. My brother, therefore, is no longer eligible to process his immigrant visa application in Vietnam under the ODP.

10. I, Minh Hai, declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in conformity with 28 U.S.C. Section 1746 in Westminster, California, on March 27, 1994.

MINH HAI

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 94-0361 (SSH)

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL. *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

DECLARATION OF DR. NGUYEN DINH THANG

I, Dr. Nguyen Dinh Thang, declare:

1. My name is Dr. Nguyen Dinh Thang. My current residence is at 7815 Snead Lane, Falls Church, Virginia. For fifteen years, I have been actively engaged in issues relating to the plight of the Vietnamese boat people in Hong Kong and Southeast Asia. During this period, I have spoken with literally hundreds of Vietnamese asylum seekers and family members in the United States. I currently serve as Executive Director of Boat People, S.O.S., Inc. I am also a member of the board of directors of Legal Assistance for Vietnamese Asylum Seekers, Inc. ("LAVAS").

2. LAVAS' staff in Hong Kong currently consists of three full-time lawyers and one full-time bilingual legal assistant. During the last year, the Hong Kong office has assisted local Hong Kong counsel in the representation of several Vietnamese asylum seekers who are the beneficiaries of current immigrant visa ("IV") petitions.

Among those assisted by LAVAS' Hong Kong office include two of the class representatives in this action, Thu Hoa Thi Dang and Truc Hoa Thi Vo. LAVAS is also currently assisting three women who are the beneficiaries of IV petitions and who had been scheduled for forcible repatriation prior to the decision of the Court of Appeals' granting Plaintiffs motion for emergency relief in this action.

3. If IV beneficiaries are required to return to Vietnam to have their applications for immigration processed, LAVAS will be impaired in its efforts to assist them in respect of such processing. LAVAS does not have an office in Vietnam and does not have the resources to establish one.

4. The LAVAS office in Washington, D.C. has received information concerning twelve cases of IV applicants who have been affected by the Department of State's decision last year to refuse processing of IV cases. In most of these cases, the applicants did not receive notification of the Department's decision until December 1993 or January 1994.

5. The U.S. Consulate recently began sending packages of INS forms ("packet three"), accompanied by a letter from Wayne Leininger, to Vietnamese asylum seekers in Hong Kong who are the beneficiaries of IV petitions. This is likely to create a great deal of confusion for the recipients of such packages. In most cases, the petitioners had already been sent packet three and, in many cases, the forms had already been completed and the documents required by the U.S. Consulate had been submitted. In fact, just two days ago, I was contacted by the sponsor of an asylum seeker in Hong Kong who expressed his bafflement as to why he had been sent packet three when he had already filled out all the [*sic*] forms and submitted all the required documents.

6. The letter from Mr. Leininger will only add to this confusion. The letter states that processing of IV applications is being resumed, but it does not specify whether such processing will take place in Hong Kong or Vietnam. This is also likely to be deeply confusing to applicants who were informed only recently that they would have to return to Vietnam in order to be processed.

7. I, Dr. Nguyen Dinh Thang, declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in conformity with 28 U.S.C. § 1746 in Washington, D.C. on March, 28, 1994.

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Dr. Nguyen Dinh Thang

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 94-0361

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

DECLARATION OF LAN QUOC NGUYEN

I, Lan Quoc Nguyen, declare:

1. I am an attorney at law licensed to practice in the State of California and the federal courts. I received a B.A. in political Science from the University of California in Riverside in 1987 and a J.D. from the University of California, Hastings College of the Law in 1990. I have been practicing law for almost four years.

2. While in law school, I served on the editorial board of the Hastings International and Comparative Law Review, a scholarly law journal which publishes articles on international and comparative law issues. I also published an article in the same law review titled "Vietnamese Traditional Law—The LA Code—and the United States Modern Law: An Comparative Analysis." This article compares a Vietnamese traditional law code as it was promulgated in 1400s with the American modern law and highlights the advancement of Vietnamese law which existed almost 500 years ago.

3. I am fluent in speaking, writing and reading Vietnamese. I am familiar and knowledgeable about Vietnamese laws, the legal systems and the political structure through various periods.

4. I currently host two television and radio shows in Southern California about legal affairs in Vietnamese. I also write for several Vietnamese newspapers on selected topics relating to American and Vietnamese law.

5. I am familiar with the current Vietnamese laws and the country's legal and political system.

6. I am currently the Chairman of the Board of Directors and Southern California Regional Coordinator of Legal Assistance For Vietnamese Asylum Seekers ("LAVAS"). I have been associated with LAVAS since 1991. I am familiar with the current Vietnamese Boat People situation and its related legal issues.

7. I have read a news article about Vietnamese marriage law titled "Marriage Procedures Between Vietnamese Citizens and Foreigners" which was published in an official newspaper of the Vietnamese government. I have also read the Vietnamese version of said article which was translated by Mr. Van Thai Tran. A copy of the news article and its translation is attached hereto as Exhibit A.

8. The subject news article appears to reflect the state of the law on the issue of marriage performed outside of Vietnam or between a Vietnamese citizen and a foreign national as promulgated by the Vietnamese Government. It is a common practice in Vietnam to publish the laws which are newly promulgated and issued by the Vietnamese Government. The news article as published would serve as competent text of the law as if it was published in a law code.

9. From reading the text of the law in question in both Vietnamese and English, it is clear that the law states that the Vietnamese Government would not recognize a marriage involving a Vietnamese national and was performed outside of Vietnam unless such marriage was endorsed by the Vietnamese Government Official Representative such as a Vietnamese Consular official where the marriage took place.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed in Westminster, California on March 28, 1994.

LAN QUOC NGUYEN

MARRIAGE PROCEDURES BETWEEN VIETNAMESE CITIZENS AND FOREIGNERS

On 1-2-1989, the Council of Ministers introduced a "Directive on procedures of marriages between Vietnamese citizens and foreigners before the governing authority of the Socialist Republic of Vietnam." Regarding general applications, the directive relates to:

The term foreigners in the directive are described as individuals who do not possess Vietnamese citizenship, including individuals who are citizens of other countries or are stateless.

The foreign individual has the right to marry according to the laws of the individual's citizenship or according to the laws of the individual's country of permanent residency at the time of the individual's filing for marriage (applicable to those who do not hold citizenship) based on the various regulations of Rules 5, 6 and 7 of the Law on Marriage and the Family of Vietnam. These individuals may be able to register for marriage with Vietnamese nationals.

Similar to Rule 54 of the Law on Marriage and the Family, if a foreigner is a citizen of a country that had signed the Treaty of Mutual Legal Assistance with the Socialist Republic of Vietnam, then the compliance with the terms of the Treaty relating to marriage is fulfilled.

The government bodies that have the authority to recognize the marriage between a Vietnamese citizen, and a foreigner are the People's Committee at the municipal level, under the Central government, and equivalent administrative districts from which the Vietnamese national resides.

With cases of Vietnamese citizens living outside the country at the time of registration for marriage with a

foreigner, if the individual made the request that is not contrary to the laws of the individual's country of current residency or the Treaty on Exchange of Consulates between the Socialist Republic of Vietnam and the country of current residency, as recognized by foreign ministry representatives or consulates of the Socialist Republic of Vietnam and the country of current residency. In this case the foreigner need not abide by the various regulations of Rules 5 and 6 of the Law on Marriage and the Family of Vietnam.

Regarding marriage registration procedures, the directive indicates:

Concerning Vietnamese citizens who currently serve in branches of the military that involves national security. . . .

Translated by Van Thai Tran

I declare under penalty of perjury that I am proficient in both English and Vietnamese and that I am competent to translate from Vietnamese to English.

Dated: March 28, 1994

VAN THAI TRAN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 94-0361

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

SUPPLEMENTAL AFFIDAVIT OF SHEPARD C. LOWMAN

District of Columbia:

SHEPARD C. LOWMAN, being duly sworn, deposes and says:

1. I submit this affidavit as a supplement to my previous affidavits dated February 24, 1994. This supplemental affidavit addresses four issues raised in the Affidavit of Brunson McKinley, dated March 15, 1994 ("McKinley Aff."), the Affidavit of Wayne Leininger, dated March 15, 1994 "Leininger Aff. I") and the Affidavit of Matthew C. Victor, dated March 15, 1994 ("Victor Aff."). These four issues are: (1) clarification of U.S. policy with respect to the processing of immigrant visa ("IV") applications of Vietnamese asylum-seekers detained in Hong Kong; (2) the impact of processing such applications on the voluntary repatriation program; (3) the impact on the efforts of family members to reunite if the beneficiaries of IV petitions were required to return to Vietnam in order to be processed; and (4) the current living conditions in Hong Kong's detention centers.

Clarification of U.S. Policy With Respect To IV Processing

2. In his affidavit, Mr. Leininger suggests that certain statements that I made in my initial affidavit with respect to the processing of IV beneficiaries by the Hong Kong Immigration Department ("HKID") were incorrect. Though I believe my description of the process to be basically accurate, the process is quite complicated and it may be useful to provide some further explanation to create a more complete picture.

3. The HKID operates a two-track screening process: a family reunification track and a refugee track. Under the family reunification track, the HKID will "screen-in" the spouse, child under the age of 21 or parent over the age of 50 of a United States citizen or permanent resident alien who entered the United States as a refugee.

4. Generally, a familial relationship that may qualify an asylum-seeker to immigrate to the United States or some other resettlement country will first be identified by the United Nations High Commissioner for Refugees ("UNHCR"). Such relationships are then reported to the HKID which, in turn, will seek to confirm those relationships, involving a U.S. link, with the United States Consulate General in Hong Kong ("the U.S. Consulate").

5. The response of the U.S. Consulate will determine how HKID processes the case. If the U.S. Consulate confirms that the asylum-seeker meets the criteria under the HKID's family reunion track, the asylum seeker will be screened-in on the basis of the family relationship without an individual refugee status adjudication. The basis for this is described in Department of

State Cable No. 383839 of 21 November 1991. (Def. Exh. B-3)[1]

6. If an asylum seeker who was screened-in on the family reunion track by HKID was the beneficiary of a current IV petition, the U.S. Consulate would process the case to its conclusion and issue a visa to the applicant once he or she was determined to be eligible.[2]

7. In addition to screening-in those IV beneficiaries who meet the HKID's criteria under its family reunion track, the HKID has also facilitated the processing by the U.S. Consulate of the cases of those who are the beneficiaries of current IV petitions, but who do not meet the HKID's family reunion criteria. In such cases (typically involving siblings, adult children, parents under the age of 50 and all qualifying relationships in which the sponsoring relative entered the United States as an immigrant), the HKID would, pursuant to Section 13D(2) of the Immigration Ordinance, release the asylum-seeker for

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[1] In some cases, a familial relationship was only discovered or established after the screening process in Hong Kong had begun or is completed. This is not surprising given the duration of detention and the dynamic nature of refugee populations. As stated in Mr. Leininger's affidavit, in some such cases the HKID has, when advised by the Consulate General of an existing U.S. relative relationship, reversed previous "screened-out" decisions to "screened-in," solely to facilitate processing of the IV applications by the U.S. Consualte (Leininger Aff. ¶ 10).

[2] If an asylum seeker who was screened-in on the family reunion track was not the beneficiary of a current IV petition, the case would be presented to the INS for a refugee status adjudication. If found by INS to be qualified as a refugee, the applicant would be so processed. If not, it is my understanding that, until June 1993, the applicant would be granted public interest parole.

processing by the U.S. Consulate upon receipt of a letter from the U.S. Consulate requesting that HKID make him or her available for that purpose.[3]

8. The recent shift in the U.S. Consulate's policy applies both to beneficiaries of current IV petitions who meet the criteria under Hong Kong's family reunification track and beneficiaries who do not. This fact is illustrated by the cases of the two class representatives in this action, Thu Hoa Thi Dang and Tru Hoa Thi Vo. Had it not been for the change in policy, Mrs. Vo, as a child of a U.S. citizen over the age of 21, would not have qualified under the HKID's family reunification track, but would have been permitted to leave the detention center for processing under Section 13D(2). On the other hand, Mrs. Dang, as the spouse of a U.S. citizen who entered the United States as a refugee, would have qualified under the HKID's family reunification track and been screened-in. Pursuant to the State Department's 1993 policy shift, however, both Mrs. Vo and Mrs. Dang were informed that they could only be processed if they returned to Vietnam.[4]

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[3]During this period, the HKID would suspend the refugee status determination process. (Aff Leininger, para 12).

[4]This is made clear in Mr. Victor's letter of September 24, 1993 to Mr. K.H. Yim, Principal Immigration Officer, HKID. This letter was explicit in stating that the U.S. Consulate would only process the immigrant visa cases of persons recognized as refugees and would not process the immigrant visa request of either a person awaiting a screening decision or screened-out as a refugee. It further stated that the use of 13D(2) would be limited to persons recommended for resettlement in the United States by the UN Committee for Vulnerable Persons, a Committee established to examine primarily unaccompanied refugee minors and victims of violence. (Lowman Aff. Exh. B).

9. This policy shift had the effect of forcing into the refugee track beneficiaries of current IV petitions of both types who had previously had their petitions processed to conclusion in Hong Kong. Moreover, the Department's policy was apparently applied retroactively to cover the cases of IV beneficiaries whose relationships had previously been confirmed to the HKID and who may have already been "screened-in" under the family reunification criteria based on those relationships. To this end, the U.S. Consulate sent a list of more than 50 IV beneficiaries, many of which were documented and ready for processing by the U.S. Consulate, to the HKID and informed it that, although these cases may have been previously qualified under the family reunification track, the U.S. Consulate would not process them unless they received an individual refugee status adjudication and were found qualified as a refugee on their own merits.

Impact Of IV Processing On Voluntary Repatriation

10. In his affidavit, Mr. McKinley expresses concern that the processing of current IV petitions in Hong Kong could alter the perception of the asylum seekers that they have no alternative but to return home and that, in turn, could reduce voluntary repatriation. (McKinley Aff. ¶¶ 9-12.) Experience over the years demonstrates that such concern is unfounded. A considerable number of current IV holders have been processed from Hong Kong for resettlement in the United States since the inception of Hong Kong's screening policy in June 1988.[5] Despite this

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[5]In his affidavit, Mr. Leininger states that: "Prior to 1989 and the advent of the CPA such cases were not an issue, since there was no screening process and all arrivals from Vietnam were granted presumptive refugee status by the Hong Kong government, and could be considered as candidates for resettlement." (Leininger Aff. I ¶ 4.) This is incorrect. Hong Kong began screening unilaterally in June 1988, one year before the adoption of the CPA.

fact, Hong Kong has had by far the highest rate of voluntary return of Vietnamese asylum seekers in the region.

11. I have visited Vietnamese refugee camps repeatedly since the fall of Saigon to North Vietnamese forces and have always been struck by the asylum-seekers' awareness of United States policies, regulations, and processing criteria. This awareness is a function of both their exposure to long-standing procedures and practices and a triangular flow of information between the camps, overseas Vietnamese communities and friends and family at home. In my view, it is certain that the Vietnamese in the Hong Kong camps are fully aware of the criteria on which the beneficiaries of current IV petitions are allowed to be processed and would not themselves be affected in their decision on voluntary repatriation if they did not meet this criteria in their own case. That decision is affected by a variety of much more important factors such as the prospects for being "screened-in" as a refugee, camp conditions and the human rights situation in Vietnam. Moreover, there is no reason to suppose that the impact of the continuation of such processing in the future on the voluntary repatriation program would be any different than it has been in the past.

12. As noted in my previous affidavit, the Comprehensive Plan of Action ("CPA") at no point speaks of the return home of Vietnamese boat people qualified for resettlement abroad on other than refugee grounds. The central point of the CPA is to establish a refugee status adjudication procedure and to remove the hope of resettlement as a refugee of persons not found to be so qualified. The Department of State, responding to concerns of the United States Consulate General in Hong Kong, puts it as follows:

> "Post maintains in Reftel paragraph five that processing subject's IV case in Hong Kong would contravene the CPA because subject has been determined [to] be a non-refugee. That would of course be true if we were proposing to resettle her as a refugee. However, she would be coming as an immigrant and, as post reports, in Reftel, all major resettlement countries have made similar requests to release detainees for immigration." (State Cable No. 422906, 14 December 1990, attached to Leininger I Aff. as Def. Exh. B-2.)

Impact of Repatriation On Family Reunification

13. In his affidavit, Mr. McKinley describes the Orderly Departure Program ("ODP") as a workable alternative to the processing of immigrants in the countries of Southeast Asia where asylum seekers have found refuge. (McKinley Aff. ¶¶ 13-16.) There is no doubt that the ODP has been a great success, offering the opportunity for refugee resettlement and family reunification to hundreds of thousands. It is less clear that it is a fair or effective answer to an asylum seeker who has fled Vietnam by boat and is residing in a detention center abroad. In the normal situation, the beneficiary of a current IV petition can walk into a U.S. consulate where he or she is resident, have that visa processed and leave to join his or her loved-ones in the United States. In this case, however, to quote State Department cable no. 422906:

> "The alternative to processing subject's immigrant visa application to conclusion in Hong Kong would be for UNHCR to counsel her to return voluntarily to Vietnam. If she agreed, file would then be transferred to ODP in Bangkok, subject would have to obtain Vietnamese exit permit, SRV would have to

> advise us she had exit permission, ODP would schedule her for interview in Ho Chi Minh City and, if approved she would be manifested to depart and a few monthe later leave for the United States. This strikes Department as procedural overkill and not at all necessary to preserve the integrity of the CPA." (Def. Exh. B-2.)

14. This description of the repatriation alternative as "procedural overkill" is correct. More importantly, it demonstrates that Mr. McKinley's description of the ODP as a workable alternative is incorrect. Mr. McKinley notes that to "the U.S. has sought to expedite the application process for immigrant visa applicants who repatriate by putting them at the head of the processing queue in Vietnam." He also notes that he is "not aware of any case in which the Vietnamese government has refused to allow the departure of an individual issued an immigrant visa by ODP." (McKinley Aff. ¶ 16.) That is fine so far as it goes. But there are a great many other obstacles to resettlement for the IV applicant who is not permitted to be processed in Hong Kong. These obstacles exist at every phase of the laborious procedures described in State cable no. 422906. They are worth noting step by step.

15. First, the asylum seeker must be counseled by UNHCR and must decide to return home. This is in itself problematic. Many interviews with Vietnamese boat people in the camps of Southeast Asia over a period of many years leave me firmly convinced that most of the asylum seekers are afraid of returning to Vietnam. It is understood that the policies at issue relate only to those asylum seekers either not yet screened or screened and found not to be refugees. In the case of those screened-out, the Hong Kong immigration authorities have found the asylum seeker not to have a "well-

founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" under the 1951 Geneva Convention Relating to the Status of Refugees. However, whether they have a well-founded fear of persecution or not, in a legal sense, my long experience is that most asylum seekers are, in fact, afraid to go home. As the human rights monitoring group, Asia Watch, has reported

> The vast majority of Vietnamese who have fled to Hong Kong are reluctant to return home, despite the harsh conditions of detention and the very low chance of resettlement in another country. One woman interviewed recently as she awaited return on the voluntary program succinctly expressed the fears of many to a reporter. "I will never be free, I am going back to Vietnam . . . Nobody knows what will happen to us. And can anyone really help us once we're back."

(*Asia Watch Report*, "Indefinite Detention and Mandatory Repatriation: The Incarceration of Vietnamese in Hong Kong," at 4 (Dec. 3, 1991), attached hereto as Exhibit A.)

16. The consequence of this is that most of those not yet screened will wait until their screening is complete before returning home. If their IV petitions are current but are not being processed in Hong Kong, this means more time lost in detention. Even for those screened-out, many will fear to return home and will resist voluntary repatriation. I have seen many instances of such behavior. A sad example was a young man in Hong Kong who was slowly going blind. Some members of his family were preparing to leave Vietnam by ODP and he was told, if he returned, he could come out with them. I

strongly urged the young man to return and it was clearly in his best interest to do so. But he feared to return and while all of his family are now in the United States, he remains ill and alone in Hong Kong. The point here is that Vietnamese boat people in Hong Kong have risked the dangers of flight from a repressive government and have endured years in detention under terrible conditions. It is then perhaps not surprising that they do not always make choices which the Department of State believes is in their own best interests. However one evaluates the wisdom of those choices, the refusal of the Department to process their IV petitions in Hong Kong will prolong both the detention of virtually all IV beneficiaries and the time they are separated from their families in the United States.

17. For those asylum seekers who take UNHCR's advice and apply for voluntary repatriation, despite any fears they may have of the consequences, the situation will still be much worse than had they been permitted to resettle directly from Hong Kong. First, these individuals must complete the process of applying for voluntary repatriation, wait for clearance from the Hanoi authorities and stand in line for a voluntary repatriation flight. Though the time it takes to complete this process has varied, it is safe to assume that in the average case several months or more will pass.

18. Next, as State cable No. 422906 points out, the "subject would have to obtain Vietnamese exit permit" and the "SRV [Socialist Republic of Vietnam] would have to advise us she had exit permission." These are processes which do not rest in the hands of the United States Government. They can be long, time consuming, and expensive, as a result of a cumbersome, inefficient and corrupt Vietnamese bureaucracy.

19. Being placed at the front of the ODP line will not be helpful to a returnee if the SRV never advises U.S. officials that exit permission has been granted. Indeed, the issuance of the exit permit may well be refused and has been in instances in the past. Of particular relevance in this connection is the fact that Vietnamese law does not recognize the validity of a foreign marriage and, in the only case that I am aware of in which an IV beneficiary who married in Hong Kong returned to Vietnam, the SRV apparently has refused to grant exit permission. It is good, of course, that Mr. McKinley is not aware of "any case in which the Vietnamese government has refused to allow the departure of an individual issued an immigrant visa by ODP." But it would be mistaken to imply more than tangential relevance to this fact since no visa is issued prior to the issuance of the exit permit.

20. Even if successful, the time required to obtain an exit permit from the Vietnamese Government is uncertain. Vietnamese Americans who have gone through the process describe it as arbitrary and unpredictable. They report that while the period may vary widely, it ordinarily will take the applicant at least four to six months to secure exit permission.

21. Once the Vietnamese exit permit is obtained and notification thereof is provided to the U.S. ODP officials, an interview is scheduled for the applicant in Ho Chi Minh City. If the applicant happens to live in Ho Chi Minh City this is not a problem. If he lives far away, however, he may face a long and difficult trip, involving several days of travel by bus on bad roads. And even after the applicant is approved for an immigrant visa, there are out processing formalities and medical exam which increase the time still further during which the applicant must remain in Vietnam.

22. Accordingly, if all goes well, it will generally take an applicant at least one year after he or she is counseled by UNHCR to repatriate before he or she will be in a position to depart Vietnam by ODP. The bulk of this time will be spent in Vietnam, where the applicant will live in fear of harassment and persecution by Vietnamese authorities, in uncertainty that those authorities will grant him or her an exit permit, and in conditions of economic and social distress. The applicant will likely have disposed of his or her home and other possessions before fleeing to Hong Kong.

23. Moreover, as one who has fled to the camps abroad and upon return is now seeking to resettle to the United States, the applicant can look to little sympathy or support from the government in Hanoi and, less so, from local authorities where he or she may be living. Indeed, Asia Watch has reported "a disturbing pattern of interrogation and low-level harassment of voluntary returnees," including a requirement that all returnees undergo several days of reindoctrination in Hanoi in which they are grilled about their activities in Hong Kong and warned not to try escaping again, a requirement in some cases that the returnee "report [his or her] activities to their local police station regularly," and a perception among others that "their difficulty in getting jobs or businesses or fishing licenses is due primarily to their status." (Exh. A. at 22-23.)

24. In short, the applicant who is denied IV processing in Hong Kong may fear to return to Vietnam, regardless of the screening decision, and refuse to return home. If the applicant can be persuaded to repatriate, he or she may find that the Vietnamese government refuses to issue an exit permit. However, barring these extremes, the applicant faces an average of a year's delay, most endured under degrading, expensive and traumatic circumstances.

Conditions of Detention, In Hong Kong

25. In his affidavit, Mr. Victor, states that "the overcrowding problem began to improve dramatically" as the asylum seeker population in Hong Kong declined. "The latest figures show that Hong Kong houses 28, 589 asylum seekers in facilities designed to accommodate 43,224." (Victor Aff. ¶ 3.) These statements paint an inaccurate picture of the current situation. For years, overcrowding in Hong Kong's camps has been endemic. When the refugee population became lower, facilities were closed and crowding continued in those remaining. When the population soared, facilities were opened. Thus, recently, as the population in Hong Kong declined, whole camps or sections of major camps have been closed. Where there were previously ten detention centers, there are now only three; High Island, Tai Ai Chau and Whitehead, and there are reports that Tai Ai Chau will be closed soon.

26. The situation at Whitehead Detention Centre—the largest of the Hong Kong Camps—gives a far more accurate portrayal of the situation than the statistics cited by Mr. Victor. Whitehead has traditionally housed about 20,000 asylum seekers; approximately 2,000 in each of its ten sections. The present population of Whitehead is approximately 18,000, with one of the ten sections housing a smaller number of people because it is devoted exclusively to voluntary repatriation. Accordingly, for approximately two thirds of those detained in Hong Kong, the overcrowding situation is roughly the same as it has been for the last five years.

27. Now, as in the past, accommodations at Whitehead and elsewhere "consist of metal longhouses . . . lined by tight rows of triple-tier bunk beds," each of which house approximately 300 people. (Exh. A. at 4.) As the Asia

Watch Report notes, "whole families inhabit one bed platform," which are typically about four feet in width, eight feet in length and about three and one half feet in height. (*Id.*) No privacy exists whatsoever. Asia Watch describes the consequences of detention in these conditions, many of which are self-evident to any eye-witness observer, as follows:

> The crowded conditions make for poor hygiene. Skin diseases often result from the lack of warm water for washing, rats and outbreaks of communicable infections are common. . . . Depression, child abuse, family breakdown and delinquency are well-documented effects of detention on camp residents. Numerous public health specialists have voiced concern that the psychological damage wrought by detention, especially upon children, is long lasting and makes reintegration into normal society problematic. Camp inmates often complain of unremitting boredom, anxiety or hopelessness, and many wander around listlessly or sleep through the day. (*Id.*)

28. Mr. Victor also asserts that educational, social and vocational programs in the camps are "widely available." (Victor Aff. ¶¶ 5, 8,) This is incorrect. As the Asia Watch report states, "[o]nly limited schooling is available, particularly for older children and adolescents." (Exh. A at 4.) Social and employment programs in the Hong Kong camps have never been adequate. Contrary to the suggestion in Mr. Victor's affidavit, this situation has gotten worse, not better. In the last two years many of the programs to which he refers have been scaled back or eliminated as part of a concerted effort to pressure the boat people to return voluntarily. (*See* "Tough New Stance to Send Home Boat People," South China Morning Post, Mar. 23, 1993, attached hereto as Exhibit B.)

29. Finally, Mr. Victor's comments on the crime rate in Whitehead misses the critical point that most such crime goes unreported. (Victor Aff. ¶¶ 6-7.) As one camp worker described the situation as of just last year, Hong Kong's camps:

> in many instances can only be described as "ghettoes of crime and violence" . . . [The criminal elements] come at night, wearing masks and brandishing knives, to intimidate and rob the people of money and jewelry[.] . . . Although 300 inmates of the hut shout and scream, no one from the Correctional Services Department arrives [until] the robbers have taken what they want and are gone. Stabbings, beatings and murders occur from time to time, but no one can inform because his or her life is in danger.

(Carole McDonald, "The CAP and the Children: A Personal Perspective," 5 Int'l J. Refugee L. 580, 582 (1993), attached hereto as Exhibit C.) Similarly, the Asia Watch Report notes that, women often try to "solve" the rape problem in Hong Kong's detention centers "by establishing a sexual relationship with a man who can protect them from others rather than by reporting abuse to the authorities." (Exh. A at 4.) Thus, while one would hope that Mr. Victor's statistics could be taken as indicative of an improvement, reports I have received indicate little or no change from the "endemic" violence described in Asia Watch's December 1991 report (Exh. A at 4.). Indeed, Correctional Services Department Senior Superintendent Mr. Ivan Wong Yoe-lin stated just last year, "In Whitehead you have 2,000 in one section. I don't think you can guarantee the life of one Vietnamese." ("Boat People Safety 'Cannot be Assured,'" South China Morning Post, Feb. 25, 1993, attached hereto as Exhibit D.). The decent populations

in the camps still live in fear. Visitors to the detention centers have often reported instances in which asylum seekers informed them that they were "volunteering" to return home because they feared that they or their families would eventually become victims of rape or violent assault if they remained in the camps much longer.

30. Finally, any improvement which may have occurred is destined to be short lived. In 1993, a number of asylum seekers suspected of criminal activities were transferred to a small detention center at Nei Kwu Chau. I am informed that in February of this year, the Hong Kong Government closed Nei Kwu Chau and transferred some two hundred such suspected criminals back to the remaining camps, over the protest of UNHCR. Once these people reestablish their networks, any improvement in the reported crime rate noted in Mr. Victor's affidavit which may have occurred can be expected to disappear.

_____
Shepard C. Lowman

Sworn to me this 29th
day of March, 1994

_____
My Commission expires: 6/30/95

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civ. Action No.

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants.*

SUPPLEMENTAL
AFFIDAVIT OF MATTHEW C. VICTOR

1. I, Matthew C. Victor, submit this affidavit as a supplement to my previous affidavit dated March 14, 1994. This supplemental affidavit addresses several issues raised in the Declaration of Thu Hoa Thi Dang, dated March 25, 1994 ("Thu Hoa Thi Dang Decl.") and the Supplemental Affidavit or Shepard C. Lowman, dated March 29, 1994 ("Lowman Supl. Aff.").

The Facts Surrounding the Refugee Asylum Request of Thu Hoa Thi Dang

2. Ms. Dang claims in her declaration submitted to the court that she did not contest her negative first instance screening decision (based on Convention grounds) because she was under the false impression that she would be screened in under family reunion guidelines (Dang Decl., para 25). HKID rejected Ms. Dang's asylum request on Convention grounds on October 7, 1993. All persons whose claims are rejected are informed in writing by HKID. On December 20, 1993, I wrote to

Ms. Dang (as well as her husband in the United States) to make her aware that, as a result of this negative decision and then current U.S. policy on processing the IV applications of the screened out, she would have to return to Vietnam to pursue her immigrant visa request. On December 23, 1993 a letter on Consulate letterhead with my signature appeared in a monthly UNHCR bulletin which is translated into Vietnamese and widely distributed in the camps (Exhibit A). In that letter I explained U.S. policy of requiring screened out asylum seekers who are also the spouses of U.S. citizens to return to Vietnam to apply for resettlement through ODP. Ms. Dang states that her name appeared on a list posted on the camp information board on December 31, 1993 (Dang Decl., para 26). She states that this was a list of those who had been denied refugee status by the Refugee Status Review Board (RSRB).

3. According to HKID records (Exhibit B—Screening status list of U.S. linked cases, name #105), the RSRB did not deny Ms. Dang's refugee claim until January 18, 1994. The list posted in camp on December 31, 1993, in fact, was not a list of those denied refugee status. Rather, it was a warning to those who had failed to contest a first instance screening decision that there cases would soon come up for review. They were asked to submit any additional documents to support their refugee claim. Ms. Dang states that she was aware at that time that we would not process her visa application in Hong Kong (Dang Decl., para 27). Apparently Ms. Dang did not heed the many warnings she received that she should pursue her asylum request through normal screening procedures.

4. In paragraph 17 of his affidavit, Mr. Lowman expresses his opinion that "it is safe to assume that in the average case several months or more will pass"

between the time that a person volunteers to return home and the time they arrive back in Vietnam. In fact, UNHCR officials have informed me that the average time it takes to process a voluntary repatriation case is 5-6 weeks.

Current Living Conditions in Detention in Hong Kong

5. Mr. Lowman in paragraph 25 continues to maintain that overcrowding is endemic in the Hong Kong refugee camps. There is no arguing the fact that Hong Kong authorities had a difficult time accomodating the great influx of Vietnamese boat people arriving from 1988 to 1991, resulting in a great deal of overcrowding. At its worst, in 1991, Hong Kong was housing 60,154 asylum seekers in facilities designed for only 57,500. However, as I outlined in my original affidavit (paras 3-5), the situation has improved dramatically in the last two years. Hong Kong is now home to 28,589 asylum seekers in centers designed to house 43,224.

6. Mr. Lowman states that Hong Kong has reduced the number of detention facilities being used to house Vietnamese asylees (Lowman Suppl. Aff., para 25). This is correct. However, as the above figures show, the decrease in available detention space has been far outstripped by the drop in the number of Indochinese asylum seekers residing here, resulting in a great improvement in living conditions. Mr. Lowman states that there are presently only three detention centers in Hong Kong housing Vietnamese asylum seekers (para 25). This is incorrect. At the moment there are six detention centers being used to house Indochinese asylum seekers in Hong Kong: High Island, Whitehead, Tai A Chau, Green Island, Chimawan Upper, Chimawan Lower. In addition there are three centers holding recognized refugees or those being processed for resettlement: Kai Tak, New Horizons, and Pillar Point.

7. Mr. Lowman quotes extensively from a 1991 Asia Watch report and his own personal experience to counter statements made in my affidavit. Simply put, this information is woefully out of date. All visitors to detention camps in Hong Kong must ask for prior Hong Kong government approval. Hong Kong authorities inform us that, to the best of their knowledge, Mr. Lowman has not visited a detention camp in Hong Kong for two years (Exhibit C—statement from Hong Kong Government Refugee Coordinator Brian Bresnihan). As I stated in my affidavit (para 2), I visit Hong Kong's detention facilities approximately every two weeks and meet frequently with officials dealing with refugee affairs, including the UNHCR welfare officer. I believe I am a more credible source of current information on living conditions in the camps than those cited by the Plaintiffs.

8. In his affidavit Mr. Lowman states that social and employment programs in detention have recently been cut (Lowman Suppl. Aff. para 28). This is only partly true. While adult educational programs that did not assist in reintegration into Vietnam have been reduced, primary education remains a guarantee for all children in detention, at a level far higher than that available to the average resident of Vietnam. Hong Kong authorities argue, with good reason, that extensive social programs are out of place among a population made up predominately of screened out asylum seekers who are awaiting return to their home country. They have accordingly reduced some social programs which they feel are inappropriate.

9. Mr. Lowman states that most crime goes unreported (Lowman Suppl. Aff. para 29). I believe this is a truism worldwide. I think the crime statistics quoted in my original affidavit speak for themselves as evidence of a sharp downward trend over the last two years and I do not want to belabor the point further. Suffice it to say

that murder in a detention center is always noticed by camp authorities (although the crime may not be solved). As I reported in my affidavit (para 7), Whitehead's murder rate in 1992 was on a par with Louisiana and New York.

_____
Matthew C. Victor

Sworn to me this 31st
day of March, 1994

_____
Clyde L. Jones, American Consul

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 94-0361

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

Plaintiffs,

SUPPLEMENTAL AFFIDAVIT OF WAYNE S. LEININGER

1. I submit this affidavit as a supplement to my affidavits of March 4, 1994, and March 15, 1994, in order, inter alia, to respond to plaintiffs' statement asserting certain "non-disputed" material facts of March 30, 1994 ("the Statement"), and to address the points raised by Mr. Shepard C. Lowman in his affidavit of March 29, 1994 ("Lowman affidavit.").

2. The Statement in paragraph 9 places the number of estimated Vietnamese asylum seekers who have arrived in Hong Kong since June of 1988 at approximately 104,000. A more accurate number, as reported by the U.N. High Commissioner for Refugees (UNHCR), is 71,470 (Attachment 1).

3. The Statement in paragraph 23 notes that in order to obtain Hong Kong police certificates it has been necessary for Vietnamese asylum-seekers detained in Hong Kong to appear personally at an office of the Royal Hong Kong police. This has been required (of all persons

seeking police certificates, not just those detained in the camps in Hong Kong) so that fingerprints might be taken. On March 30, 1994, Mr. Brian Bresnihan, the Hong Kong Refugee Coordinator, informed me that Vietnamese in the camps seeking police certificates could have their fingerprints taken by Correctional Services Department personnel in the camps themselves. Mr. Bresnihan noted further that—to assist those who, lacking primary civil documents, must resort to statutory declarations as secondary evidence—the respective camp commanders were fully empowered to act as notaries. For neither purpose, then, will it be necessary for Vietnamese visa petition beneficiaries to appear personally at any Hong Kong Government office.

4. The statement in paragraphs 25 and 26 attempts to describe the circumstances under which the Consulate General wrote, and under which it now can not write, so-called "Section 13(D)(2)" letters to the Hong Kong Government. Further background information is necessary for a complete understanding of this situation. Under Section 13(D)(2) of the Hong Kong Immigration Ordinance, the Hong Kong Government has a dual obligation: to facilitate a detainee's application for entry documentation to a country of possible resettlement and —should that application prove successful—to release that individual from detention so that onward travel can be carried out. Until recently, the Hong Kong Government required letters from foreign consulates requesting that it exercise its Section 13(D)(2) responsibilities in both of these circumstances, and levying, in the exchange of correspondence, the expectation that the subject of the letter would be resettled within a specific period of time. The Consulate General's letter of September 24, 1993, cited by the statement, is clear in its context that 13(D)(2) letters would no longer be provided by the Consulate General in connection with the

processing of immigrant visa applications of those in the camps. This was so since (as stated in paragraph 8 of my affidavit of March 14, 1994) the Consulate General was not and is not properly in a position to offer advance assurances of resettlement before the immigrant visa interview takes place. The Consulate General can and will issue such letters after an applicant has demonstrated eligibility for and been issued an immigrant visa, in order to ensure release from detention for onward travel to the U.S. We have also (as stated as well in paragraph 8 of my March 14 affidavit) worked out other arrangements with the Hong Kong Government concerning the appearance of applicants at the Consulate General for their formal immigrant visa interviews.

5. The Statement's assertions in paragraphs 27 and 28 concerning the actions and alleged inactions of the Consulate General in confirming family relationships of immigrant visa beneficiaries to the Hong Kong Government are inaccurate. There was no change in policy or practice before or since April of 1993. Information on the nature of the family relationships; the status of the sponsor in the United States; the basis on which immigrant visa petitions or VISAS 93 (see paragraph 4 of my March 14 affidavit) procedures were initiated; and the status of any resulting pending visa applications, was and is routinely shared with the Hong Kong Government and with the UNHCR. The weight which the Hong Kong Government attaches to this information in its screening activities or in its decisions on candidates for inclusion on Orderly Departure Program flight manifests is something outside of the Consulate General's control.

6. This explanation is relevant as well to the statements in paragraphs 7 and 8 of the Lowman affidavit. While it is true that the Consulate General does not exe-

cute 13(D)(2) letters for immigrant visa applicants detained in the camps to facilitate their appearance at the Consulate General for interview, such letters are not necessary for them to pursue their applications. The implication in paragraph 8 that Ms. Vo has been somehow disadvantaged by not having such a letter issued on her behalf is therefore incorrect. The change in policy similarly had nothing to do with the finding of the Hong Kong Government that Ms. Dang was not a refugee. As explained in paragraph 13 of my March 14 affidavit, in order to qualify for "following to join" status under the "VISAS 93" program—that is (to use Mr. Lowman's terminology, to be put on the "family reunification track"), the relationship between petitioner and beneficiary must have been in existence at the time the petitioner's refugee status was granted (8 CFR 208.21(b), Attachment 2). Ms. Dang's marriage took place after her husband's arrival in the United States, and this by no one's standards—not those of the U.S., nor of the Hong Kong Government, nor of the UNHCR—ever entitled nor now entitles her automatically to refugee status.

7. Mr. Lowman's observations in paragraph 9 of his affidavit are misleading. No change in policy at this Consulate General regarding the processing of the immigrant visa cases of the screened-out could ever have resulted either in pushing such a screened-out asylum seeker into the "refugee track" or in denying refugee status to anyone previously screened-in. A screened-out asylum seeker, by definition, is not entitled to refugee status; he could not have been "pushed into the refugee track." A screened-in asylum seeker, conversely, has always been processed for admission to the United States at this post, either as a refugee, or—to conserve refugee numbers—as an immigrant, if he or she also qualified for that status. No screened-in asylum seeker has ever had that status "revoked" as a result of

a change in policy or practice with respect to processing the immigrant visa applications of the screened-out. Only immigrant visa beneficiaries who had been screened-out received letters from Matthew Victor informing them that (at that time) the Consulate General would not be in a position to complete the processing of their cases. Mr. Lowman's broad and uncritical use of the term "family reunification track" to encompass the cases of the screened-in; the screened-out beneficiaries of immigrant visa petitions; the VISAS 93 beneficiaries; and even the beneficiaries of public interest parole granted under wholly separate authority by the U.S. Immigration and Naturalization Service has created confusion in this area.

8. Footnote 5 to the Lowman affidavit accurately notes that the Hong Kong Government had embarked independently in June of 1988 on a screening program of claims to refugee status, but it misses the point that it was only after the June, 1989 CPA agreement that the United States Government was in any way obliged to take screening status into account in setting its immigrant visa processing policy. The Department's August, 1989 cable, providing the first post-CPA guidance, was an explicit recognition of these new obligations. That message, and the subsequent telegrams to the field issued as the Department's policy evolved, constitute a continuous record of weighing of the equities involved on both sides of the question.

9. The fears voiced by Mr. Lowman in paragraph 16 of his affidavit that the beneficiary of a current petition whose screening status is uncertain will waste time waiting in detention are unfounded. First, as plaintiffs are aware, the Consulate General has resumed processing of all current immigrant visa cases. Secondly, first-instance screening was completed in Hong Kong this

month. There therefore should be no one in the camps whose claim to refugee status has not been evaluated at least once. Even if such an individual were to choose to remain in Hong Kong to pursue any still-available avenues of appeal, the Consulate General would continue to process the immigrant visa application.

10. As I have noted previously, the Consulate General readily confirms the existence of U.S. relative relationships and pending immigrant visa cases of those in the camps to the Hong Kong Government. Even as we continue to process the cases that are "current" (those that have no priority dates, or dates that have been reached), however, the United States cannot directly prevent the involuntary repatriation to Vietnam of any Vietnamese in Hong Kong. In order to attempt to forestall their repatriation, the only available option open to the United States is to make a diplomatic demarche to the Hong Kong Government, requesting that it not repatriate Vietnamese in whom we have an interest due to relative relationships with U.S. citizens or permanent residents. More than one such demarche was made with regard to the beneficiaries of U.S. immigrant visa petitions who had been scheduled to depart on the March 8 Orderly Return Program flight to Vietnam. The Hong Kong Government ultimately decided not to repatriate these individuals. We have no assurances that this decision constituted a precedent in future cases.

11. Under penalties of perjury, I affirm that the foregoing statements are true and correct to the best of my knowledge and belief.

_____

Wayne S. Leininger

March 31, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 94-0361 (SHH)

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS, ("LAVAS"), ET AL., *Plaintiffs*,

v.

DEPARTMENT OF STATE, ET AL., *Defendants*.

SUPPLEMENTAL AFFIDAVIT OF BRUNSON MCKINLEY

1. I submit this affidavit as a supplement to my previous affidavit of March 15, 1994, submitted in this proceeding. I have reviewed the affidavits submitted by plaintiffs in this case on March 30, 1994, with their opposition to defendant's motion to dismiss and for summary judgment, including the supplemental affidavit of Shepard C. Lowman.

2. As the agency responsible for the conduct of United States foreign policy, the Department of State is the lead agency with respect to refugee policy involving aliens outside the United States. The Department of State takes all relevant information into account in deciding what policies to pursue, weighing the accuracy of the information available and forming its own foreign policy judgments as to what course the United States should pursue. It does this in close consultation with the National Security Council, the Immigration and Naturalization Service, and other interested government entities. It also consults from time to time with

interested members of Congress, and conducts annual formal consultations with Congress concerning the refugee admissions program, as required by Section 207 of the Immigration and Nationality Act. In addition, because the situation of South East Asian asylum seekers is of interest to a wide spectrum of the American public, the Department frequently consults with various private interest groups about refugee policies it is pursuing or thinking of pursuing. A wide range of views is often expressed, and the foreign policy adopted by the Department with respect to refugees sometimes leaves some private groups dissatisfied.

3. Several of the affidavits submitted by plaintiffs on March 30, including most notably the supplemental affidavit of Mr. Lowman, speak to core foreign policy issues that have long been the subject of discussion between the Department of State and U.S. refugee advocacy groups, including the groups with which Mr. Lowman is now associated. (See, *e.g.*, the InterAction position paper, Attachment 1.) The views expressed in these discussions have been weighed by the Department of State in deciding what policies to adopt with respect to the situation of Vietnamese asylum seekers in South East Asia and Hong Kong. The foreign policy issues involved have similarly been considered by the governments participating in the CPA and by the U.N. High Commissioner for Refugees. The views of the governments, including the United States, are reflected in the consensus statement of the CPA Steering Committee adopted on February 14, 1994, attached as Attachment 2. This statement resulted from the Fifth Steering Committee meeting referenced in paragraph 7 of my prior affidavit. (I should note here that paragraph 3 of my prior affidavit erroneously suggests that Cambodia is a participant in the CPA; in fact, the CPA expressly reflects that the issue of Cambodian (Khmer) refugees will be handled separately.)

4. The policy debate regarding asylum seekers in South East Asia and Hong Kong has centered largely on two issues: the efficacy of the refugee screening process in various countries of first asylum and the appropriateness of involuntary repatriation. Material to the second question are one's perceptions of conditions in Vietnam. Views of these conditions and, correspondingly, of involuntary repatriation differ: some believe that conditions in Vietnam are no worse than in many other countries and that Vietnamese who have arrived illegally in countries like Hong Kong should be expected to return; others have very negative images of conditions in Vietnam and oppose any forcible return of the Vietnamese.

5. I outline this debate in an effort to explain that Mr. Lowman represents one of many points of view that are ordinarily weighed by the Department of State in deciding what foreign policy to pursue. It appears from plaintiffs' affidavits and other filings that plaintiffs oppose any involuntary return of the Vietnamese, or at least of Vietnamese who are beneficiaries of immigrant visa petitions. As explained in my March 15, 1994, affidavit, the United States is now officially on record as not opposing the involuntary return program of Hong Kong. This position represents a change in U.S. foreign policy since the CPA was adopted in 1989. At that time, the United States conditioned its support for the CPA on an understanding that the screened-out Vietnamese would not be required to return to Vietnam involuntarily, but did not rule out the possibility of supporting involuntary repatriation in the future. As noted in paragraphs 7 and 8 of my prior affidavit, the United States agreed at the CPA steering committee meeting of February 1994, that it would no longer object to Hong Kong's involuntary return program, but that it would not like to see involuntary return programs extended to

other countries for the time being. (See the Statement of Warren Zimmermann attached hereto as Attachment 3.) The United States further said, however, that it would review its position on other involuntary return programs at the end of 1994.

6. The change in U.S. policy toward involuntary return reflects a number of considerations. Included among them are the following factors: (1) the Department of State believes that conditions in Vietnam have continued to improve, as noted by the former Director of the Bureau for Refugee Programs, Warren Zimmermann, in his statement to the February 1994 CPA Steering Committee (Attachment 3); (2) ODP has continued to develop and is now a much more viable avenue for emigration from Vietnam than it was in December 1990, when the Department sent the cable attached to Mr. Leininger's affidavit of March 15, 1994, as Attachment 2 and discussed at length in Mr. Lowman's Supplemental Affidavit (90 State 422906). (In reference to the statement made in paragraph 16 of my prior affidavit concerning use of ODP by returnees, I should clarify that, while it would take 3-4 months to be interviewed and approved for a visa, additional time would be required to complete exit formalities. As stated by Mr. Charles Neary in paragraph 4(viii) of his affidavit of April 4, 1994, the total time from return to exit may be 6-12 months.)

7. I have read and considered the statements of Mr. Lowman in paragraphs 10—12 of his supplemental affidavit to the effect that third country resettlement of the screened-out will not have a detrimental effect on repatriation efforts. Ms. Anne Wagley in her affidavit also submitted by plaintiffs appears to take a similar view, based on observations several years old. It is in fact difficult to separate out the many factors that influence the

Vietnamese asylum seekers who have been screened out. Nevertheless, as stated in my prior affidavit, there is a real concern among the governments participating in the CPA and representatives of the U.N. High Commissioner for Refugees that resettlement of the screened-out will have a negative impact on voluntary repatriation. It is for this reason that the Department of State will have to monitor carefully the effects of its recent decision to attempt immigrant visa processing of the screened-out.

8. U.S. refugee policy in South East Asia and Hong Kong, including its policy with respect to resettlement of screened-out asylum seekers, has been and is likely to remain complex and must respond to changing circumstances. This issue involves delicate foreign policy judgments and bilateral relationships, and therefore must continue to be handled with the utmost care within the current foreign policy context.

I declare under penalty of perjury that the above statements are true to the best of my knowledge and belief.

_____

Brunson McKinley

April 5, 1994

INTERACTION
American Council for Voluntary International Action

September 3, 1993

Ambassador Warren Zimmermann
Director
Bureau for Refugee Programs
US Department of State
Washington, D.C. 20520

Dear Ambassador Zimmermann,

It is our understanding that the Steering Committee for the Comprehensive Plan of Action (CPA) for the treatment of Vietnamese boat people will meet early next year to review the CPA program and to discuss next steps as we near the end of the screening process. We further understand that interested delegations may be participating in preparatory discussions for this meeting during the UNHCR EXCOMM meeting in early October. We believe that this is a critical point in the implementation of the CPA and wish to present the following recommendations with respect to the U.S. approach to these meetings.

United States Role in the CPA

It has been our strong impression that, the United States has played a relatively passive role in the later stages of implementation of the CPA except for its direct obligations under the CPA such as financial contributions and the resettlement in the United States of its share of the boat people identified as refugees in the screening process. However, the success of the Indochinese program as a major humanitarian venture was largely due to United States leadership. As the CPA, and the program itself, draws to an end, we believe that it is vital that the United States once again engage itself

actively in shaping the final act of the CPA and assuring that it conforms with the standards of humanity and concern for this population that guided our earlier efforts.

Screening Coming to an End

The screening process is now coming to an end. All but several thousand applicants already have been screened and most appeals are expected to be completed within a year. While many of us have concerns about the screening process, all of us acknowledge that the CPA prescribes that third country resettlement will not be available to those screened out. There are certain egregious cases which we would hope to bring to your attention, and we would urge that the UNHCR authority to mandate such cases be extended to all CPA first asylum countries. Except for such extreme cases, however, there remain approximately 75,000 persons most of whom will eventually have to return home to Vietnam. Regardless of the correctness of their screening decisons, a large number of these people feel strongly that they would be in jeopardy if they return to Vietnam. Others have invested both material resources and a significant portion of their lives in an attempt to achieve resettlement. They will not be brought easily to a decision to return home.

Forcible Measures Are Counterproductive

The only government to date to engage in forcible repatriations is the United Kingdom with respect to small numbers of refugees forcibly returned from Hong Kong. Other first asylum nations and the UNHCR, however, have taken a wide variety of measures which make life more difficult in the camps. Rations have been cut, access to outside markets reduced, freedom of movement more closely circumscribed and social services eliminated or restricted. Unacceptable crowding, once dictated by an overwhelming flow of boat people, has

been perpetuated by transfers and camp closings. Many of these measures appear to have been taken to press the boat people to accept repatriation; often this reasoning is explicitly and publicly stated.

During the years of the boat people crises, the NGOs, in their partnership with the Department of State, played an important role in advocating for the Vietnamese boat people and bringing them to the United States. Whatever one says about screening or current conditions in Vietnam, at the time of their departure from their homeland the present residents of the camps had compelling reasons to leave—economic or otherwise. With the implementation of the CPA, however, they found themselves caught by a sea change in public policy. The logical conclusion to the CPA process is for NGOs and the US Government to continue their partnership and assist those individuals who have been found ineliegible for third country resettlement to return home in a peaceful and dignified manner.

We also believe that the present course of action is counterproductive. It sets up a confrontational mode between the boat people and their keepers and casts the question in the boat people's mind as whether to accept repatriation or resist it. These actions all register in the minds of the boat people as actions taken by those hostile to their interests to force them to return to Vietnam; thus, reinforcing their belief that return is not in their best interest. It is probably correct that for some of those leaning towards returning home anyway, especially recent arrivals in the camps, such coercive measures will encourage voluntary returns, but many of these have already gone home.

For the remainder, who are more inclined to resisting being forced home, none of these harsh measures are likely to persuade them to accept repatriation. Their

response, so far has been to resist with the only means at their dispoal. Already there have been suicides and attempted suicides, hunger strikes, protests, riots and growing levels of camp violence. This can only be the tip of the iceberg if active measures to force their return continue. This would be a tragic ending to what has been a great and extraordinarily successful humanitarian effort over the past 18 years. And it need not be. If NGOs and governments commit themselves to working together to implement a Peaceful Return Home program, this long effort can be brought to an humane and expeditious conclusion.

A Peaceful Return Home

If forcible return could cease and the coercive measures now being implemented could be rolled back, the agencies would be prepared to join in educating this population in the nature of the choice that faces them. While few of us would directly advise these people to return home, leaving that decision to them, we would help to make it clear that their choice is not a longer wait for resettlement but a longer wait for a return home. Their judgment must be: are they now better off at home or in a refugee camp? We believe our role will help in shaping this choice and that, as they face such a decision in a non-coercive setting, a steady and growing number of the boat people will choose return, without the trauma that surely faces us all if the present course is continued. We urge the Department to accept this principle, and a partnership on this issue with the NGOs, as the linchpin of United States policy in the intergovernmental talks on the CPA to be held in the coming months.

If there could be a monitoring program with adequate funding and the necessary access, the American NGOs would be prepared to second personnel to such a moni-

toring effort. If funding is available, we would also be prepared to assist in programs to ease the reintegration of these people in their home society.

Attached is a more detailed set of recommendations as to how a peaceful return home for the boat people might be implemented. These have been endorsed by the below listed agencies. Additional organizations are currently reviewing the recommendations and may add their endorsement to the list. In the meantime, we would very much look forward to an opportunity to discuss these with you in a timely fashion.

Sincerely,

Donald N. Hammond, Chair
Committee on Migration and
Refugee Affairs
Director, US Ministries
World Relief

On behalf of:

The American Refugee Committee
Church World Service, Immigration
and Refugee program
Episcopal Migration Ministries
Hebrew Immigrant Aid Society
Indochina Resource Action Center
International Catholic Migration
Commission
International Rescue Committee
Jesuit Refugee Services
Lutheran Immigration and Refugee Services
Refugees International
US Catholic Conference, Migration
and Refugee Services
US Committee for Refugees

STATEMENT BY THE FIFTH STEERING COMMITTEE OF THE INTERNATIONAL CONFERENCE ON INDO-CHINESE REFUGEES
(Adopted on 14 February 1994)

Reaffirmation of the CPA

1. The Steering Committee met on 14 February 1994 and reviewed all aspects of the Declaration and Comprehensive Plan of Action approved by the International Conference on Indochinese Refugees held at Geneva, Switzerland, on 13-14 June 1989.

2. The Steering Committee reaffirmed the fundamental principles underlying the Comprehensive Plan of Action, in particular the discouragement of clandestine departures, the regular departure programmes, the refugee status determination procedures, the resettlement of those determined to be refugees and the return to their country of origin of persons determined not to be refugees in accordance with international practices reflecting the responsibilities of states towards their own citizens.

3. The Steering Committee recognized the significant progress made under the CPA since the last Steering Committee meeting, noting that the total number of Vietnamese residing in camps in the region had dropped from some 120,000 persons at the inception of the CPA to some 60,000 persons as of this date. However, despite the fact that over four years have elapsed since the adoption of the CPA, the population in the camps in the region remains large and represents a heavy burden both to first asylum countries and to the international community as a whole. Recognizing the achievements of the CPA, the Steering Committee nevertheless concluded that new initiatives were needed particularly to increase the rate of repatriation and bring the CPA to an early and successful conclusion.

4. The Steering Committee called upon all members urgently to address outstanding issues, as described below, in order to provide appropriate durable solutions for all concerned and to bring various activities and programmes under the CPA in first asylum countries to an early conclusion with a target of the end of 1995 or earlier where possible.

In this context, the Steering Committee noted that the Governments of the Socialist Republic of Viet Nam and the Lao Peoples Democratic Republic have agreed to make every effort, in cooperation with the International Community to enhance capacities to receive returnees from first asylum countries by the end of 1995.

Clandestine Departures

5. The Steering Committee welcomed the very significant decline in the departure of Vietnamese asylum-seekers to countries in the region over the past two years. While noting that a very small number of persons continue to make their way to certain first asylum countries, the Steering Committee reiterated its view that clandestine departures should be discouraged and that measures should continue to be taken against those organizing clandestine departures. In this regard, the Steering Committee called upon UNHCR, the Socialist Republic of Viet Nam as well as intergovernmental and non-governmental organization, to continue their public information activities, both inside and outside Viet Nam for the purpose of discouraging clandestine depatures.

Regular Departure Programmes

6. The Steering Committee reaffirmed its strong support for regular departure programmes, which provide the safest and most appropriate means of seeking migration from Viet Nam. The Steering Committee welcomed the considerable success of regular departure programmes from Viet Nam which have enabled the migration of more than 300,000 persons since the CPA went into effect. The Steering Committee recognized the importance these programmes have had in reducing the number of clandestine departures and expressed appreciation for the sustained efforts made by the country of origin and the receiving countries in facilitating direct departures. The Steering Committee called upon Governments as well as the International Organization for Migration (IOM) to continue providing the necessary facilities to enable individuals eligible under the various programmes to depart for family reunification or for other legitimate purposes. The Steering Committee also called upon Governments to facilitate where appropriate the return and subsequent migration of eligible non-refugees in accordance with national criteria.

Reception of New Arrivals

7. While recognizing that the number of new arrivals had dropped dramatically over the past two years, the Steering Committee expressed appreciation to those first asylum countries and territories in the region which, in the framework of the CPA, have continued to grant temporary asylum.

Status Determination Procedures

8. The Steering Committee noted the considerable progress made in carrying out refugee status determination procedures throughout the region. The Steering

Committee welcomed the completion of status determination procedures in the Philippines and Indonesia, and expressed appreciation for the steps undertaken by remaining first asylum countries and territories towards the earliest possible completion of the refugee status determination procedures.

9. The Steering Committee expressed the view that status determination throughout the region had been carried out in accordance with established refugee criteria. The Steering Committee emphasized that with the completion of first instance determinations, followed by a review upon appeal, there would be no further review under CPA procedures of determinations made.

10. The Steering Committee declared that, as a result of changing circumstances within the country of origin, screening procedures under the CPA should no longer be applicable to Vietnamese arriving in first asylum countries after 14 February 1994. Vietnamese arriving after the above date will be treated in accordance with national legislations and internationally accepted practices.

11. The Steering Committee took note of the progress achieved in the work of Special Committees in reviewing the situation of unaccompanied minors and called on Governments concerned and UNHCR to bring this work to a conclusion by mid-1994.

Resettlement

12. The Steering Committee expressed satisfaction at the success of the programme for the resettlement of the pre-cut-off date camp population which, since the inception of the CPA, has enabled the resettlement of all but 1,800 of these persons. In the spirit of burden sharing and in accordance with the principle of fulfilling respective responsibilities under the CPA, the Steering

Committee appealed to all countries to provide early humane solutions for those refugees who have remained for long periods of time in camps. With regard to the post-cut-off date refugees, the Steering Committee noted that progress had been made but appealed to all concerned countries to strengthen their efforts towards the early resettlement of those who have been determined to be refugees. Recognizing the complexity of the issues involved, the Steering Committee agreed that a technical meeting be held as early as possible in 1994 in order to discuss practical steps to resolve outstanding issues and in particular the situation of those refugees who have been in camps for an extended period of time.

Repatriation/Plan of Repatriation

13. The Steering Committee noted with appreciation that some 60,000 Vietnamese had returned voluntarily to their country of origin since the beginning of the CPA and that the terms of the Memorandum of Understanding signed between Viet Nam and UNHCR on 13 December 1988 have been adhered to. The Steering Committee recognized that considerable efforts have been made by the country of origin at the central and local levels in receiving the returnees and transporting them to their towns and villages of residence. The Steering Committee also expressed appreciation for the efforts made by the Vietnamese authorities in facilitating UNHCR's monitoring responsibilities which has enabled UNHCR to have regular access to individuals and their families following their return. The Steering Committee noted that the reintegration programme had been successful and that returnees have been able to resume normal lives with the assistance of UNHCR, the European Community's International Programme, bilateral donors and non-governmental organizations.

14. The Steering Committee noted, however, that over some 60,000 Vietnamese remain in first asylum countries, a great majority of whom have been determined not to be refugees and that many of those remaining have not yet volunteered to return. The Steering Committee endorsed the decision taken by UNHCR to reduce the amount of individual reintegration assistance at this stage from US$ 360 to US$ 240 for those who had not volunteered prior to 1 November 1993, or within three months of having received final status determination, and called upon UNHCR to keep under review the possibility of further reductions in the level of individual reintegration assistance.

15. While noting the success of voluntary repatriation and the continued need to promote it, the Steering Committee nevertheless expressed the feeling that additional arrangements were now appropriate to expedite the return of all non-refugees from camps in the region in accordance with internationally accepted practices as provided for under paragraph 14 of the CPA.

16. To this effect, the Steering Committee took note of the Orderly Return Programme (ORP) in Hong Kong agreed upon on 29 October 1991, and recognized that orderly return programmes can have a beneficial impact on the voluntary repatriation programme. The Steering Committee also noted that a Memorandum of Understanding on principles and arrangements relating to returning Vietnamese non-refugees from Indonesia had been reached on 2 October 1993 and welcomed the readiness of the Government of Viet Nam to undertake, at the earliest opportunity, negotiations with other countries in the region with a view to reaching similar agreements on the return in safety and dignity of all non-refugees with appropriate international assistance for their re-integration. The Steering Committee called

upon UNHCR to participate in the process of orderly return to the maximum possible extent in accordance with its role as designated by the Secretary-General and its mandate.

17. The Steering Committee expressed confidence that through voluntary repatriation, together with orderly return programmes, the return of all non-refugees from first asylum countries could be accelerated to meet the target date of end 1995.

18. The Steering Committee welcomed the information provided that the reception capacities of both the Hanoi and Ho Chi Minh City transit centres have been recently substantially increased reaching a transit capacity adequate for the repatriation target. In this connection, the Steering Committee also noted with appreciation the efforts undertaken by the country of origin to increase the frequency of visits by interviewing delegations to first asylum countries and the flexibility shown in considering late applicants for voluntary return. The Steering Committee urged that procedures for the implementation of orderly return programmes be kept as simple as possible and that the processing of lists and biodata submitted under these programmes be carried out quickly to permit an early return of those who have not volunteered.

19. The Steering Committee noted with satisfaction that, based on its monitoring activities in Viet Nam, UNHCR has found no substantiated reports that any of the 60,000 returnees have suffered ill treatment on return. The Steering Committee reaffirmed that the treatment of returnees should continue to be consistent with the guarantees and undertakings provided in the Memorandum of Understanding between the Socialist Republic of Viet Nam and UNHCR of 13 December 1988. In view of the expected increase in the rate of

returns, the Steering Committee called upon UNHCR to increase its monitoring capacity according to needs and to continue its reintegration assistance to all returnees in Viet Nam without distinction as to the programmes under which they return.

Public Information Campaign

20. The Steering Committee recognized the importance of reliable and accurate information for public awareness and understanding of the objectives of the CPA and to enable non-refugees to understand better the alternatives available to them. The Steering Committee agreed that a renewed and effective information campaign be continuously inplemented in order to increase the understanding among all agencies and individuals involved of the objectives and mechanismes of the CPA and to emphasize the need for an early repatriation of the non-refugees remaining in camps in the region. The Steering Committee also encouraged all parties concerned to conduct regular public information campaigns.

Care and Maintenance

21. The Steering Committee noted that, with the decline in the number of persons in first asylum camps, and taking into account the scarcity of financial resources, there was a need for UNHCR to standardize and adjust assistance provided in camps in the region and to rationalize non-essential assistance to the camp population as a whole, at the same time emphasizing that essential services to maintain health and well-being will continue in all camps.

EC Reintegration Assistance

22. The Steering Committee welcomed the European Community's International Programme (ECIP) for the

repatriation and reintegration of Vietnamese and regards that programme as having been a major step towards achieving a durable and comprehensive solution to the problem of Vietnamese asylum-seekers. The Steering Committee noted that a large number of returnees, together with local populations, had been able to benefit from credit schemes, vocational training and employment-generating projects which had enabled them to assume productive livelihoods in Viet Nam. The Steering Committee strongly encouraged international donors to contribute sufficient funds to ensure that the ECIP was enabled to keep pace with the accelerated rate of reintegration. The ECIP is due to end on 1 December 1994 but the Steering Committee noted that the revolving credit fund would remain active for three years after the completion of the programme in the provinces where the programme operated. In the meantime, the ECIP and other contributions to the re-integration of Vietnamese returnees should be given wide publicity, both in Viet Nam and in first asylum camps, to encourage asylum-seekers to return home prior to completion of these programmes in order to receive maximum benefit from the assistance provided.

Unaccompanied Minors

23. The Steering Committee noted with satisfaction that over 4,000 unaccompanied minors had returned to Viet Nam, including some 180 who had been processed under the family reunification programme. The Steering Committee welcomed the agreement reached on simplified procedures under the family reunification programme for those minors for whom Special Committees had decided it was in their best interest to return. The Steering Committee expressed concern, that despite these simplified procedures, considerable time was often required before the minors were cleared to return and,

in light of the adverse effects on the unaccompanied minors of prolonged stay in the camps, called upon the country of origin to expedite clearance to the maximum extent possible. The Steering Committee also called upon UNHCR to intensify its efforts to encourage the return of the remaining unaccompanied minors, and to assist governments in implementing the family reunification programme before the end of 1994 on a continuous basis, in cases where Special Committees had determined that it was in the minors' best interest to return.

24. The Steering Committee expressed appreciation for the valuable role undertaken by Nordic Aid to Returned Vietnamese (NARV) in the care and reintegration of unaccompanied minors. The Steering Committee felt that NARV had played a crucial role, together with UNHCR, in carrying out home assessments, strengthening community activities, building educational facilities, visiting returnee minors and helping in their reintegration process. The Steering Committee noted that almost all returned unaccompanied minors had joined their families, or extended families, and had resumed normal lives. The Steering Committee noted that a large number of unaccompanied minors still remain in the camps in the first asylum countries and encouraged UNHCR and NARV to continue to provide adequate monitoring and re-integration assistance until the end of 1994.

Laotian Asylum-Seekers

25. The Steering Committee took note of the results of the Sixth Tripartite Thai-Lao-UNHCR Meeting in Savanakhet, Lao People's Democratic Republic, from 15 to 16 July 1993 on the repatriation of Lao refugees and asylum seekers. The Steering Committee urged all parties concerned to reinforce efforts for the return and

reintegration of Laotian refugees and asylum-seekers from Thailand and other neighbouring countries and called upon UNHCR to coordinate with donor countries as well as international development agencies and NGOs to increase the capacity of the Lao People's Democratic Republic to absorb a higher number of returnees. In this context, the Steering Committee welcomed the recent decision of the Government of the Democratic Republic of Laos and the European Community to start a new re-integration programme for returnees in the Bokeo province in close cooperation with UNHCR.

Implementation and Review Procedures

26. The Steering Committee expressed deep appreciation for contributions made by the donor community towards UNHCR's 1992 and 1993 CPA programmes and called upon the donor community to ensure that UNHCR's 1994 and 1995 CPA programme budgets are fully funded. The Steering Committee noted with concern that the Government of Hong Kong has incurred expenses of over US$100 million for the care and maintenance of asylum-seekers in Hong Kong which remain uncovered and called upon donors to contribute to the Hong Kong programme.

27. The Steering Committee expressed appreciation for the convening by UNHCR of an informal meeting of the Steering Committee in Ho Chi Minh City on 27 April 1993 at which time members were informed of progress achieved under the CPA as of that date. The meeting also expressed appreciation to UNHCR for having convened in Geneva on 30 November 1993, a Preparatory Meeting for the Fifth Steering Committee meeting.

28. The Steering Committee called on UNHCR to

continue to coordinate the implementation of the CPA. The Steering Committee requested UNHCR to report further on progress made towards the completion of various activities under the CPA. The Steering Committee decided it would meet again at an appropriate time, to be worked out by the Chairman in consultation with Steering Committee members, to ensure the successful completion of the programmes by the target date of end 1995. In the interim, UNHCR should convene technical meetings, in the region as it deems appropriate to enhance the implementation of specific elements of the CPA.

Statement by Warren Zimmermann
Head of the U.S. Delegation
At the Fifth Meeting of the Steering Committee
of the International Conference
On Indo-Chinese Refugees

Geneva, February 14, 1994

Mr. Chairman:

The United States Delegation welcomes the language of the Steering Committee statement we have just approved and the words we have heard on the floor this morning to the effect that this Comprehensive Plan of Action (C.P.A.) should end with as much speed and dignity as possible by the end of 1995.

As the C.P.A. ends, it is important to emphasize the principle of voluntary return, which has been the dominant principle since the beginning. The statement underlines the replication of "non-objector" programs—that is, programs that do not use force—and we desire to see that C.P.A. member states continue to fashion return programs in coordination with UNHCR, as called for in the Steering Committee statements.

However, if the voluntary approach does not prove completely successful, we will have to move to "additional arrangements" as provided in our statement. The United States government does not in principle oppose mandatory return of screened-out non-refugees in accordance with international law and practice, when necessary, as a supplement to the preferred solution of voluntary returns. However, we believe that, for the time being, mandatory return should not be extended beyond its present application. The Steering Committee

statement calls for increased efforts to encourage voluntary return as well as other alternatives that do not contemplate the use of force, and we believe these should be given time to work. We will, of course, continue to monitor the situation and be prepared to review this important issue at the end of 1994.

We believe this approach is the fairest in making clear to the people in camps who have been found not to be refugees that voluntary return to Vietnam is their best option and that there is no possibility of resettlement or of remaining in the camps indefinitely. Moreover, conditions in Vietnam have improved considerably, as evidenced by the 60,000 Vietnamese who have chosen to return. Our own bilateral relationship with Vietnam—including the lifting of the embargo and the decisions to open liaison offices—should also contribute to voluntary return.

Mr. Chairman, we support your statement regarding paragraph 10 of the Statement on Arrangements following the conclusion of the C.P.A. It is also the view of the United States, that new arrivals should be treated like any other asylum seekers, including respect for the principle of non-refoulement. We appreciate those countries that have continued to respect first asylum, and we urge that this critical principle be respected in the future.

Thank you.

UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 94-0361 (SSH)

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*

v.

UNITED STATES DEPARTMENT OF STATE, ET AL., *Defendants.*

AFFIDAVIT OF CHARLES NEARY

I, Charles Neary, declare as follows:

1. I am a Foreign Service Officer assigned to the United States Embassy in Bangkok, Thailand. My principal duties are as a Consular Officer attached to the U.S. Orderly Departure Program (ODP). To fill those duties, I travel regularly to Vietnam to conduct interviews of Vietnamese applicants seeking to immigrate to the United States. Prior to taking this assignment, I received 44 weeks of training in the Vietnamese language, enabling me to conduct interviews in Vietnamese. A native Vietnamese speaking interpreter is usually present at the interviews to avoid any misunderstandings.

2. Since my arrival in Thailand in August 1992, one of my specific duties has been to promote and monitor voluntary repatriation from countries of first asylum of Vietnamese nationals eligible to migrate to the United States. In furtherance of that duty, I have traveled to camps for asylum seekers in Thailand, Malaysia, Singapore, Indonesia, the Philippines and Hong Kong. I

have held group meetings with asylum seekers in Malaysia and Indonesia and conducted individual counseling sessions with ODP eligible applicants in all of the aforementioned countries.

3. During these meetings I have drawn on my personal knowledge of the procedures for asylum seekers who elect voluntarily to return to Vietnam in order to pursue their applications through ODP. I have informed eligible applicants that, should they return to Vietnam, ODP will track their movements and I will arrange to conduct their immigrant visa interview in Vietnam myself. Since my arrival, I have conducted interviews for almost all applicants for immigration status who have voluntarily repatriated from countries of first asylum. I have conducted several hundred such interviews, often meeting with returnees. I had previously counseled in the country of first asylum.

4. Based on my personal experience and discussions with officials of the office of the United Nations High Commission for Refugees (UNHCR), ODP eligible returnees undergo the following proceedures when returning to Vietnam under the voluntary repatriation program

(i) On departure from the country of first asylum, adult returnees receive $50 from UNHCR.

(ii) Returnees originally from the southern part of Vietnam arrive at Tan Son Nhat airport, surrender their laissez-passers and travel directly to a reception center located at Thu Duc, north of Ho Chi Minh City. I have personally observed procedures at the airport and at Thu Doc. Returnees originally from the northern and central parts of Vietnam return to Hanoi's Noi Bai airport before going to a reception center.

(iii) At the reception centers, returnees are issued a certificate by UNHCR identifying them as voluntary returnees ("Giay Hoi Huong"). Returnees spend from one to three days at the reception centers before returning to their homes. UNHCR provides transportation as necessary. Since September 1, 1993, adult returnees have at this time received an additional $240 from UNHCR. (Prior to that, the resettlement allowance was $360.)

(iv) Returnees present their Giay Hoi Huong to the local authorities in their home area in order to register their names of the Family Register ("Ho Khau").

(v) Meanwhile, ODP, having been informed of the applicant's return, ensures that the file is documentarily complete and schedules an early interview, usually for the next available interview session in which I am scheduled to participate.

(vi) Returnees apply for exit permission using their Giay Hoi Huong and Ho Khau.

(vii) If the files are documentarily complete, interviews generally take place within 3-6 months after return. When returnees appear for their interviews, in addition to determining eligibility criteria as for other applicants, I routinely ask a series of questions about the experience of the voluntary repatriation process. These questions include, but are not limited to, whether the returnees encountered any difficulties with local or national authorities in getting the required documentation or otherwise and whether any fees were solicited by those authorities. In a small minority of cases, applicants have reported having to pay $4-6 for registration to Ho Khau. A larger minority reports that they have not yet received their exit permits. The External Relations Service of the Vietnamese Foreign Ministry

has cooperated in waiving the normal requirement for pre-issuance of exit permits for applicants who are returnees. Where necessary, I write a letter of introduction to approved applicants in order to facilitate issuance of their exit permits.

(viii) Approved applicants undergo medical examination and wait to be manifested on a flight for the United States. These procedures generally take from 3 to 6 months. This means that the process from return to Vietnam until departure for the United States takes from 6 to 12 months.

5. Based on my interviews of hundreds of returnees, conducted both with and without the presence of an interpreter, I am satisfied that the Vietnamese Government has no policy of discriminating against or extorting funds from returnees. By way of example, following her return to Vietnam, a returnee who acted as interpreter for me in Malaysia was able to find employment at the Saigon Business Center while waiting for her interview and departure. I am also satisfied that ODP is able to schedule eligible returnees for interview and that they are able to appear for those interviews and depart for the United States if approved.

6. I have read the declaration of Minh Hai regarding the circumstances of his brother Nguyen Ngoc Son. I am in possession of the ODP file relating to Mr. Son's case. The information in title confirms that Mr. Son returned to Vietnam on December 30, 1993. On February 8, 1994, ODP sent Mr. Son a letter of introduction to assist him in securing an exit permit from the Vietnamese authorities. The file is silent as to when Mr. Son may have made any request for exit permit or the result of any such request. I would note, however that because a letter of introduction is generally required in

order to obtain an exit permit, if Mr. Son made his application without the letter of introduction, that may explain why he did not obtain his exit permit at that time. On February 1 and February 16, ODP wrote to Mr. Son's wife, Ms. Annette Ferguson, requesting submission of an affidavit of support in order to complete the file. To date, ODP has received no response to that request. Notwithstanding the lack of an affidavit of support, ODP has included Mr. Son's name on a list of persons to be submitted to the Vietnamese Government with a request that they appear for interview. This was done prior to receipt of Minh Hai's declaration.

7. While I have no knowledge of any difficulties encountered by Mr. Son in obtaining his exit permit, I personally know of three cases in which applicants who have concluded marriages outside Vietnam have been interviewed and approved. Moreover, on March 31, 1994, after reading Minh Hai's declaration, a U.S. Orderly Departure Program officer who was presently in Vietnam asked the head of the office within the Vietnamese Foreign Ministry that handles ODP whether the Vietnamese Government would issue exit permits based on marriages entered into outside Vietnam. He advised that exit permits would be issued on the basis of such marriages, even if they occurred in first asylum camps in Hong Kong. The Foreign Ministry official also said that, while marriages by Vietnamese outside Vietnam are not automatically recognized under Vietnamese law, such marriages in fact receive de facto recognition. To the best of my knowledge and belief, no ODP eligible applicants have been denied an interview based on the lack of a Vietnamese marriage certificate. With regard to Mr. Son, ODP will continue to seek an early interview to determine his eligibility to emigrate to the United States. In view of the public charge provi-

sions of section 212(a)(4) of the Immigration and Nationality Act, it will be difficult to approve his application, however, before receiving the affidavit of support from his wife.

8. I note that Minh Hai in his affidavit states that his brother, Mr. Son, told him that the U.S. Consulate told him (Mr. Son) "that he must return to Vietnam within 90 days if he wishes to apply for departure from Vietnam through the ODP." This confused hearsay statement makes no sense, as it is simply untrue that Vietnamese in first asylum camps in Hong Kong must return to Vietnam within any particular time period in order to have their immigrant visa applications processed through ODP. When a Vietnamese who is approved for an immigrant visa through ODP has relatives in first asylum camps who ordinarily would travel with that Vietnamese as part of the same family unit (i.e., beneficiaries of the same petition), the departure of the approved Vietnamese from Vietnam for the United States is deferred for 90 days to provide the relatives in first asylum an opportunity to return to Vietnam and travel with the approved relative. If the individual in first asylum does not return to Vietnam within those 90 days, the family member in Vietnam is "released" to travel to the United States without the individual in first asylum. This would not be applicable to someone like Mr. Son, insofar as his immigrant visa application depends on the petition of his U.S. citizen wife. Moreover, there is no reason why the spouse of a U.S. citizen would have to apply for an immigrant visa within 90 days of any particular event.

9. Based on my knowledge of procedures for ODP eligible returnees, I am satisfied that they face no undue hardships upon their return to Vietnam. In fact, return to Vietnam removes returnees from the hardships of the

camps described in the declaration of Thu Hoa Thi Dang. This would not be applicable to someone like Mr. Son, insofar as his immigrant visa application depends on the petition of his U.S. citizen wife. Moreover, there is no reason why the spouse of a U.S. citizen would have to apply for an immigrant visa within 90 days of any particular event.

10. To my knowledge, the Vietnamese returned to Vietnam involuntarily have not yet included any Vietnamese eligible for the U.S. Orderly departure Program. Involuntary returnees do not receive assistance from UNHCR. I have no reason to think however, that any involuntarily returned Vietnamese eligible for ODP would have any difficulty pursuing an immigrant visa application after returning to Vietnamese. There is no indication that the Vietnamese Government treats involuntary returnees any differently than voluntary returnees in respect to matters relevant to immigrant visa processing. Moreover, the Vietnamese Government is a party to the Comprehensive Plan of Action which reflects in Section B the Vietnamese Government's commitment to facilitating departures through ODP and in Section F its commitment not to persecute returnees.

I declare, under penalties of perjury of the laws of the United States, that the foregoing statements are true and correct to the best of my knowledge and belief.

_____
Charles Neary

April 4, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 94-0361 (SSH)

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

DECLARATION OF CATHERINE W. BROWN

1. I am the Assistant Legal Adviser for Consular Affairs in the Legal Adviser's Office of the U.S. Department of State. In this capacity I provide legal advice to the Department of State concerning immigration matters and was asked to speak with Daniel Wolf, attorney for the plaintiffs in this action, with respect to processing immigrant visa applications of immigrant visa petition beneficiaries in first asylum camps in Hong Kong.

2. I first spoke with Mr. Wolf on Tuesday, February 22, 1994, and advised him that the Department's policy was under review and that we hoped to complete that review by the end of the week—*i.e.*, by Friday, February 25. On Wednesday, February 23, 1994, I sent Mr. Wolf by facsimile transmission the letter at Attachment C confirming that this review was taking place and that we hoped it would be completed by the end of the week. The letter also advised that the Department was considering sending interim instruc-

tions to the field pending completion of that review.

3. On Wednesday night, subsequent to transmission of the letter at Attachment C, the Department sent all South East Asian processing posts the cable at Attachment A, which shows that it was transmitted shortly after midnight (0414 Zulu time) on February 24. This is the interim instruction referred to in my February 23 letter.

4. On Friday, February 25, 1994, the Department sent all South East Asian processing posts the cable at Attachment B. This cable was completed and delivered to the Department's communications center in the morning, before the Department learned that plaintiffs had filed their temporary restraining order application.

I declare under penalty of perjury that the above statements are true to the best of my knowledge and belief.

_____

Catherine W. Brown

ATTACHMENT A
Civil Action No. 94-0361 (SSH)

EAP/L CARDS CENTER

Page 01 State 946562 240414Z 036939 S085691
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Info: LFOB (01) LF0D (01) LCA (01)
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10-16 ADS-98 NSAE-90 OIC-92 RP-10 VO-96
FMP-00 /941R
Drafted by: L/HRR:MKLEIN-SOLOMON: MKS
Approved by: L/CA:CWBROWN
RP/A: TRUSCH
RP/AAA:
BFLEMING
CA/VO:DDILLARD (DRAFT)
EAP/CM: DKELLY
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AMEMBASSY KUALA LUMPUR
AMEMBASSY JAKARTA
AMEMBASSY MANILA
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AMEMBASSY TOKYO
INFO USMISSION GENEVA IMMEDIATE
AMEMBASSY CANBERRA
AMEMBASSY OTTAWA
AMEMBASSY LONDON

UNCLAS STATE 046562

Geneva for RMA

E. O. N/A

TAGS: CVIS, PREF, VM

Subject: First Asylum IV processing

1. This is an action message. See para 4.

2. Summary. The Department is currently reviewing its policy with respect to consideration of immigrant visa petitions for screened-out Vietnamese asylum seekers in countries of first asylum. During the pendency of the policy review, Department wishes to preserve the status quo. This cable contains instructions for doing so. If there are additional measures that posts believe are necessary to accomplish this objective, please inform Department asap so that authorization can be granted for taking such measures.

3. Background. It has come to the Department's attention that our practice of requiring Vietnamese immigrant visa beneficiaries to return to Vietnam for IV processing through the orderly departure program ("ODP") may be inconsistent with a Department regulation concerning the place of application for IV's. Relevant to a resolution of this issue are the department's continuing interest in promoting adherence to the comprehensive plan of action ("CPA") for Vietnamese and Laotian asylum seekers in South East Asia and the need to discourage continued irregular movements of non-refugees in the region. The Department is currently reviewing the relevant legal and policy issues.

4. Action requested. It would be helpful if, during this review, posts would suspend advising immigrant visa petition beneficiaries that their applications will not be adjudicated in first asylum countries. In addition, we ask that during the period of our review posts use best efforts with host country officials to see that U.S. immigrant visa petition beneficiaries are not involuntarily repatriated, and that any such beneficiaries who may be planning to repatriate voluntarily are informed the review is taking place. The purpose of such notice is to permit these beneficiaries to decide whether to repatriate or to postpone repatriation pending completion of the department's review. Finally, the Department requests that posts bring to its attention any cases where requiring the IV beneficiary to return to Vietnam for processing through ODP may lead or have led to a failure to meet the one year application dealine set forth by INA 203 (G) and 22 C.F.R. 42.83.

5. Department hopes to complete its policy review this week. Posts will be advised of the results. Christopher

ATTACHMENT B
Civil Action No. 94-0361 (SSH)
Unclassified
EAP/L Cards Center

Page 01 (State 048852 0517320 048129 0821237
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INSE-00 10-16 ADS-00 NSAE-89 OIC-82 RP-10
VO-86 FMP-00/841R

Drafted by: L/CA;CWBROWN: CWB
Approved by: L/CA:CWBROWN
RP: POAKLEY
CA: DHOBBS
L/HRR:MKLEINSOLOMON
L/CA: VLAIRDCA/VO/L:CDSCULLY

RP/A:TRUSCH (DRAFT)
EAP/CM:DKELLY
CA/VO:DDILLARD

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AMEMBASSY MANILA
AMEMBASSY SINGAPORE
AMEMBASSY TOKYO
INFO USMISSION GENEVA IMMEDIATE
AMEMBASSY CANBERRA
AMEMBASSY OTTAWA

UNCLAS STATE 048852

Geneva for OMA

E.O. 12356: H/A
TAGS: CVIS, PREF, VM
Subject: First Asylum IV Processing Ref; STE 046562

1. This is an action message.

2. REFTEL advised that Department was reviewing question of processing immigrant visa petitions of beneficiaries in first asylum camps. Dept has concluded that all addressee posts should initiate normal processing of such aliens either by sending them packet 3 per standard procedures or by continuing normal processing after packet 3 is sent by TIVPC. Post should inform most governments of this decision and emphasize that neither the sending of packet 3 nor the actual scheduling of a formal interview for final action constitutes a guarantee on the part of the USG that the alien will be documented for entry into the United States as an immigrant, or otherwise resettled by the United States. Cutoffs must be able to adjudicate the application on the merits and, if the alien does not establish eligibility, deny it. Accordingly, the viability of processing will depend on host governments agreeing to permit IV interviews of those who have not been screened in on the understanding, that applicants may be denied or approved and that if they are denied, the United States will accept no responsibility for their resettlement.

3. Addressee posts should therefore approach host governments and request that applicants be made available for interviews on this basis. If such permission is granted, posts should process those applicants/beneficiaries whose petitions have been current the longest and schedule their interviews, consistent with need to adjudicate posts overall IV workload.

4. Dept is aware of concern that IV processing of persons in first asylum camps who have not been "screened in" will reduce incentives for such persons to return to Vietnam and Laos, unless IV interviews in Ho Chi Minh City would occur considerably sooner. (See ODP query, para. 7 below.) Dept will want to watch this situation closely. Posts therefore should not schedule interviews more than one month in advance. Post should also keep Dept apprised of the impact of this decision on the willingness of persons in first asylum countries to return home.

5. Dept has not repeat not concluded that the policies with respect to IV processing pursued to date were impermissible because of Dept's regulation on where aliens should apply for IV. The Department has concluded that the interpretation of the regulation need not be definitively resolved at this time. It has also concluded that IV petition beneficiaries in first asylum camps should, to the extent possible, have their applications processed where they are physically present while the Department practice on such processing is monitored in light of a variety of factors, including the recent CPA conference in Geneva, lifting of trade sanctions against Vietnam, most government reactions, and the impact of IV processing on repatriation efforts.

6. Posts should advise Dept promptly of whether host governments have granted permission for IV interviews as outlined above and of scheduled interviews. Posts should thereafter keep Dept. fully informed of all relevant developments.

7. For ODP please advise Dept. of your interview schedule in terms of how far in advance you are scheduled for interviews in Ho Chi Minh City. Dept would like to know whether you could offer Vietnamese in first asylum IV interviews in Ho Chi Minh City sooner than they can be scheduled in first asylum countries. Christopher

ATTACHMENT C

Civil Action No. 94-0361 (SSH)

February 23, 1994

BY FAX

Daniel Wolf, Esq.
Hughes Hubbard & Reed
1300 I Street, N.W.
Washington, D.C. 20005-3306

Dear Mr. Wolf:

I appreciated the opportunity to talk with you yesterday about the Department of State's policies with respect to the processing of immigrant visa applications of beneficiaries who are in first asylum camps in South East Asia and have not been found eligible by host government officials and/or the U.N. High Commissioner for Refugees for third-country resettlement as refugees. As I advised you, the Department has this matter under review, and hopes to complete its review by the end of this week.

I am currently communicating with interested bureaus in the Department regarding the issues you have raised and a number of related concerns. In light of your concern that some of your clients may be prejudiced by the passage of time, we are investigating the possibility of sending interim instructions to the field while this matter is under review.

The review process would be facilitated if you were to provide us with more specific information about the frustrations particular aliens have encountered or you believe will encounter as a result of our visa processing

policies. To confirm the information I gave you yesterday: you may fax to me directly at 736-7559.

Sincerely,

Catherine W. Brown,
Assistant Legal Adviser
Consular Affairs

ORAL ARGUMENT SET FOR NOVEMBER 4, 1994

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5104
(C.A. No. 94-0361)

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ET AL., *Appellants*,

v.

UNITED STATES DEPARTMENT OF, STATE, BUREAU OF CONSULAR AFFAIRS ET AL., *Appellees*.

NOTICE TO THE COURT

Appellants, through undersigned counsel, hereby give notice to the Court that the Department of State has determined that, effective December 1, 1994, United States Consulates in Hong Kong and other Southeast Asian countries will discontinue immigrant visa processing for Vietnamese asylum seekers who have been determined not to qualify as refugees. The attached cable to affected United States Consulates sets forth instructions for implementing this decision.

Respectfully submitted,

ERIC H. HOLDER, JR.
United States Attorney

JOHN D. BATES
Assistant United States Attorney

R. CRAIG LAWRENCE
Assistant United States
Attorney

BERNADETTE SARGEANT
Assistant United States
Attorney

Outgoing Telegram
Department of State

Unclassified

CA/VO/F/P:GSHEAFFER:GS
10/28/94 31173 WWVOFPL 9297
CA/VO:MHANCOCK

PRM: TRUSCH
PRM/A/O:DPENDERGRASS
EAP/CM:DKELLY
PRM/A/O:NLEES-THOMPSON

CA/VO/F:AMARWITZ
L/CA:CBROWN
EAP/RSP:AJURY

CA, PRM
Immediate Hong Kong, Geneva immediate, Bangkok immediate, Singapore immediate, Kula Lumpur immediate, Manila immediate + Priority Tokyo, Canberra priority, Ottawa priority

Geneva for RMA
E.O. 12356: N/A
TAGS: CVIS, PREF, HK

Subject: Cessation of immigrant visa processing for screened-out Vietnamese

Reference: (A) state 48852, (B)(State 46562, (C) Hong Kong 8878 (Notal)

1. Summary. Department concurs with recommendation in REFTEL (C) that immigrant visa applications from screened-out Vietnamese asylum seekers should

no longer be processed in the countries of first asylum. A careful review determined that the practice has helped to discourage voluntary repatriations. Action requests and proposed talking points follow. End summary.

2. REFTEL (A) Advised posts in countries with Vietnamese first-asylum camps to attempt normal immigrant visa processing for any current beneficiaries among screened-out Vietnamese detainees. REFTEL (A) also asked posts to advise Department whether host governments would permit such processing, and to report the policy's impact on the willingness of persons in first asylum countries to return home.

3. Of addressee posts only Hong Kong was able to conduct normal immigrant visa processing in accordance with these instructions. Hong Kong and other posts later reported adverse impacts resulting from the policy in reftel. Hong Kong recommended that processing of immigrant visa applications from screened-out Vietnamese should end. Department concurs.

4. Effective December 1, Hong Kong should cease accepting new immigrant visa cases for processing from screened-out Vietnamese detainees.

5. Applications from individuals who report themselves documentarily qualified prior to December 1 should be completed as expeditiously as possible given Hong Kong's workload. Vietnamese detainees who are beneficiaries of approved immigrant visa petitions, but who do not report themselves documentarily qualified prior to December 1, should be advised that their cases will be processed by the orderly departure program after repatriation to Vietnam.

6. Hong Kong should immediately notify Vietnamese detainees with pending IV cases, as well as organizations or attorneys of record known to be assisting Vietnamese detainees with U.S. immigration claims, of the December 1 cutoff date. Action addressee should advise host governments that the U.S. will no longer attempt to process outside Vietnam any immigrant visa applications from screened-out Vietnamese detainees.

7. Posts can draw on the following talking points to respond to inquiries:

—After careful consideration of the situation, the Department of State has decided to cease accepting immigrant visa applications from screened-out Vietnamese asylum-seekers in first asylum camps in southeast Asia and Hong Kong.

—Upon review, the Department determined that the practice of processing applications from this group was having an adverse effect on U.S. foreign policy concerns in Asia. There are clear indications that our accepting these immigrant visa cases outside Vietnam is one of the factors discouraging screened-out asylum seekers from agreeing to repatriation, and thus seriously undermines the comprehensive Plan of Action.

—Applicants who are not ready for a visa interview in accordance with U.S. regulation by December 1 will be required to process their cases in Vietnam through the U.S. orderly departure program.

—ODP estimates that visa processing for repatriated Vietnamese now can be completed in three to four months. The Department of State will work closely with ODF to ensure that these cases are handled as expeditiously as possible.

8. For Geneva: Please notify appropriate officials at UNHCR of the above developments.
Jakarta Immediate Y

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civ. Action No. 94-0361 (SSH)

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS, ("LAVAS") ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS ET AL., *Defendants*.

DECLARATION OF YUNG MANDY

I, Yung Mandy, declare:

1. My name is Yung Mandy (previously known as Ong Man Hue). I reside at 377 W. Broad Street, Falls Church, VA 22046. I am a native of Vietnam, born September 12, 1965, and a citizen of the United States. I am the wife of Luu Han Vy.

2. My husband is a citizen of Vietnam. He arrived in Hong Kong in 1990, where he has been incarcerated in closed detention centers ever since. He currently resides in the Tai A Chau Detention Centre.

3. Both my husband and I are ethnic Chinese. After the fall of Saigon, especially at the climax of the 1979 war between Vietnam and China, my family was harassed and discriminated against by local authorities and the Vietnamese Government. I was denied schooling and my future was shattered. In 1979, My father successfully escaped Vietnam with some of my siblings and resettled in America the following year.

4. Luu Han Vy and I were introduced to each other through a family member and built our relationship while we were in Vietnam.

5. He was also unable to tolerate the severe and persistent discrimination and persecution of ethnic Chinese. My husband decided to flee Vietnam, when the rest of my family and I were sponsored by my father and resettled in the United States in 1989.

6. On September 15, 1992, I came to Hong Kong to marry my husband. On October 5, 1992, I filled out an I-130 petition for an immigrant visa for my husband and sent the completed form to the Immigration and Naturalization Service.

7. On October 30, 1992, I was informed by the INS that my petition for my husband was approved with a priority date of October 13, 1992 and that it had been sent to the Department of State Immigrant Visa Processing Center. (Exhibit A)

8. I became a United States citizen on May 18, 1995. (Exhibit B)

9. I amended my visa petition to reflect that I am now an U.S. citizen. My husband is now eligible for his interview with the American Consulate.

10. Despite the Consulate's insistence, my husband is absolutely unwilling to return to Vietnam. His unwillingness to return to Vietnam is because he fears that his life and freedom would be threatened by the Vietnamese authorities. Moreover, he has no confidence that if he were to repatriate, the communist authorities would permit him to leave the country, even if the U. S. is willing to grant him an immigrant visa.

11. I, Yung Mandy, declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in conformity with 28 U.S.C. Sec. 1746 in Fairfax, Virginia, on May 22, 1995.

Yung Mandy

DECLARATION OF MARK L. ZUCKERMAN

1. I am the Regional Coordinator for Legal Assistance for Vietnamese Asylum Seekers ("LAVAS"), based in Hong Kong. For the past 21 months, I have worked with hundreds of Vietnamese asylum seekers detained in Hong Kong who wish to migrate to the United States to be reunited with their family members there. I am familar with the laws and regulations of the U.S. Government concerning immigration to the United States.

2. The following individual is a screened-out Vietnamese asylum seeker who is currently detained in Hong Kong and is the beneficiary of a current U.S. immigrant visa petition.

3. Mr. Nguyen Van Ton, a native and national of Vietnam, presently resides at Tai A Chau Detention Center. He arrived in Hong Kong in 1990 as an undocumented illegal alien and was immediately placed in detention. Mr. Nguyen is the unmarried son of Mr. Nguyen Van Dien. The senior Mr. Nguyen was born in Vietnam and is now a U.S. citizen. He resides at 2451 Kensington Avenue, Philadelphia, Pennsylvania 19125. Mr. Nguyen has filed a petition for a United States immigrant visa on behalf of his son, Mr. Nguyen Van Ton. The Immigration and Naturalization Service approved the petition on May 15, 1996. The petition is current under the F1 preference category—unmarried child of U.S. citizen.

4. The U.S. Consulate in Hong Kong refuses to process the immigrant visa petition of the above named applicant in Hong Kong and requires that the beneficiary, Mr. Nguyen Van Ton, return to Vietnam for processing under the Orderly Departure Program.

5. Under penalty of perjury of the laws of the United States, I declare that the foregoing is true and correct to the best of my knowledge.

Executed in Washington, D.C.
On June 24, 1996.

_____
Mark L. Zuckerman

Supreme Court of the United States

No. 95-1521

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Petitioners*

v.

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS, INC., ET AL.

ORDER ALLOWING CERTIORARI.

Filed June 17, 1996.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

June 17, 1996